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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

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No. 339

MONTICELLO TOBACCO COMPANY, INC.,
Petitioner,

v.

THE AMERICAN TOBACCO COMPANY, AMERICAN SUPPLIERS, INC., PAUL M. HAHN, VINCENT RIGGIO, LIGGETT & MYERS TOBACCO COMPANY, JAMES W. ANDREWS and WILLIAM A. BLOUNT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	5
STATEMENT OF CASE	8
Respondents' Conviction of Anti-trust Law Violations	8
The Wide Departure of the Courts Below from Established Procedure in Treble-Damage Cases	9
Nature of Petitioner's Claim	10
The Position of the Respondents	12
The Two Types of Evidence Offered by Petitioner to Make Its *Prima Facie* Case	13
Lexington Judgment Admitted for Limited Effect After Testimony by Individual Respondents Admitting Their Conviction	14
As Evidence of Respondents' Conspiracy, Power and Intent to Exclude Competitors, the Lexington Judgment Was Properly Offered	15
Denial by Courts Below to Petition of the Ultimate Facts Determined by Lexington Judgment	18
The Substance of Petitioner's Evidence Warranting Submission to the Jury	19
Respondents' Control of Distributors	20

JUN 2 1954

PAGE

Petitioner as Respondents' Competitor for Public Taste 24

The Quality of the Monticello Cigarette 26

The Adequacy of Petitioner's Management 27

Sales Promotion of Petitioner's Cigarette 31

Refusal of the Jobbers to Give Petitioner Distribution 32

Development of, And Conditions In, Tobacco Industry 39

Dismissal of Petitioner's Complaint and Invasion of Jury's Province By Courts Below 40

SPECIFICATIONS OF ERRORS 42

REASONS FOR GRANTING THE WRIT 48

I. The Usual Reasons Acceptable to This Court Are Present 48

II. The Requirement of Direct Evidence to Make the Treble Damage Plaintiff's *Prima Facie* Case, Represents a Wide Departure from Established Procedure 49

III. The Narrow Scope and Effect Given to Respondents' Final Judgment of Conviction, by the Court Below Conflicts with the Intent of the Statute and the Rule of This Court 50

IV. The Court Below Invaded the Jury's Province, Despite the Presence of Substantial Evidence Raising Issues of Fact for Decision by the Jury 51

CONCLUSION 51

PAGE

BRIEF IN SUPPORT OF PETITION 53

Opinion Below 53

Jurisdiction 53

Questions Presented 53

Statutes Involved 53

Statement of Case 53

Specifications of Errors 54

Outline of Argument 54

I. Petitioner did not have the burden to make a *prima facie* case by direct evidence as to all matters not distinctly determined at Lexington, or as to any other matters introduced by it 56

II. The Clayton Act conferred on petitioner as a small, private litigant, without requesting it to be a witness in the prior criminal anti-trust case, the fullest benefits by estoppel under the Lexington Judgment 56

III. Petitioner's *prima facie* evidence of respondents' intent to exclude competitors, did not have to be based on a finding of actual exclusion of competitors in the antecedent criminal case... 57

IV. The burden of proof of the entire case resting upon petitioner does not mean that the court should so far encroach upon the province of the

PAGE

jury as to require that one inference should be more thoroughly proven than another if both are reasonable and rational. 58

V. Invasion of the jury's province by the courts below was predicated on their misconception of the evidence to enable more than one reasonable inference to be drawn from it, and failure to admit evidence offered by petitioner 59

VI. The cases cited by the court below in its opinion are in apposite, and the decision of this Court in the *Emich* case does not hold that direct evidence is essential to establish impact of the conspiracy on a treble-damage plaintiff 61

VII. To require more meticulous proof than the Record discloses would amount to holding that the skillful concealment of the respondents and distributors is an invincible barrier to proof ... 62

VIII. In considering the motion to dismiss petitioner's complaint, the court below should have recognized that the Sherman Act directs itself against the "dangerous probability" that the respondents conspired to exclude competitors, their power and intent to do so being present and every inference fairly deducible from the fact should have been made in favor of petitioner... 62

CONCLUSION 63

Because of the substantial question of general importance presented and the errors of the courts below, this Court should issue the writ prayed for by petitioner 63

CASES CITED

PAGE

American Can Co. v. *Ladoga Canning Co.*, (Cir. 7) 44 F. 2d 763, 769-770 60
Baltimore American Insurance Co. of N. Y. v. *Pecos Mercantile Co.*, 122 F. (2d) 143 61
Bank of United States v. *Carneal*, 2 Pet., 543, 7 L. Ed. 513 62
Bordonaro Bros. Theatres v. *Paramount Pictures, Inc.* (Cir. 2), 176 F. 2d 594, 596 .....56, 58, 59
Bratt v. *Western Airlines*, 155 F. (2d) 850, cert. den. 328 U. S. 735 61
Builders Steel Co. v. *Commissioner of Internal Revenue*, 179 F. (2d) 377 61
Carter v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430.. 49
Congress & Empire Spring Co. v. *Edgar*, 99 U. S. 645 61
Eastman Kodak Co. v. *Southern Photo Material Co.*, 273 U. S. 359, 375 .....9, 56, 60
Emich Motors Corp., et al. v. *General Motors Corp., et al.*, 340 U. S. 558, 568 and 569 .....3, 9, 13, 50, 56
Farris v. *Interstate Circuit*, 116 F. (2d) 409
Frost v. *Bankers Commercial Corp.*, (2 Cir.), 195 F. 2d 505, 507 63
Goldman v. *United States*, 245 U. S. 474, 477 49
Kiefer-Stewart Co. v. *Seagram & Sons*, 340 U. S. 212, 213 .....48, 60
Milgram v. *Loew's, Inc.*, (Cir. 3) 192 F. 2d 579, 583.. 56
Moore v. *Chesapeake & Ohio R. Co.*, 340 U. S. 573 .. 49
Phillips Petroleum Co. v. *Payne Oil Corp.*, 146 F. (2d) 546 61
Shipley v. *Pittsburgh & L. E. R. Co.*, 83 F. Supp. 772.. 61
Stony Parchment Co. v. *Patterson Co.*, 282 U. S. 555, 563, 566 60

PAGE

The American Tobacco Co., et al. v. *United States,* 328 U. S. 783, 798 ..... 2, 8, 16, 18, 24, 50, 56, 57, 58
The American Tobacco Co., et al. v. *United States,* 147 F. 2d 93 ..... 46, 56
The Eastern States Case, 234 U. S. 612 56
United States v. *Aluminum Company of America,* 148 F. 2d 416 57
United States v. *Aluminum Company of America,* (U. S. D. C., S. D. N. Y.) 35 F. Supp. 820, 823-825. 61
United States v. *Johnson,* 318 U. S. 503, 517, 518.... 62
United States v. *Sherman,* (Cir. 2) 171 F. 2d 619 59
United States v. *Spagnuolo,* (Cir. 2) 168 F. 2d 768, cert. denied 335 U. S. 824 59
United States v. *Socony-Vacuum Oil Co.,* 310 U. S. 150 62
Western Coal & Mining Co. v. *Beberich,* 94 Fed. 329.. 61
William H. Rankin v. *The Associated Bill Posters,* (Cir. 2) 42 F. 2d 153-154, cert. denied, 282 U. S. 864 57

STATUTES INVOLVED

Sherman Act
Section 1, Title 15 U. S. C. A. 5, 53
Section 2, Title 15 U. S. C. A. 6, 16, 53
Section 12, Title 15 U. S. C. A. 6, 53

Clayton Act
Section 4 ..... 2, 49, 50, 53
Section 5 (U. S. C. Section 16) .. 9, 12, 15, 43, 49, 50, 53
Section 15, Title 15 U. S. C. A. 7, 53
Section 16, Title 15 U. S. C. A. 7, 17, 53
Section 240(a) of the Judicial Code 2

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MONTICELLO TOBACCO COMPANY, INC., *Petitioner,* *v.* THE AMERICAN TOBACCO COMPANY, AMERICAN SUPPLIERS, INC., PAUL M. HAHN, VINCENT RIGGIO, LIGGETT & MYERS TOBACCO COMPANY, JAMES W. ANDREWS and WILLIAM A. BLOUNT, *Respondents.*	No.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Monticello Tobacco Co., Inc., plaintiff below, prays that this Court issue a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Southern District of New York dismissing petitioner's complaint at the close of petitioner's case in a trial to the court and a jury.

Opinion Below

The opinion of the Second Circuit Court of Appeals is not yet reported, and is printed at R. 4289 to 4297. The District Court did not write an opinion.

Jurisdiction

The judgment of the Second Circuit Court of Appeals was entered on the 19th day of June, 1952. Petitioner invokes the jurisdiction of this Court under Section 240(a) of the Judicial Code as amended by Act of February 13, 1925 (28 U. S. C. Section 347(a)) and Rule 38 of the Revised Rules of this Court.

Questions Presented

I. (a) Must the plaintiff in a treble-damage action under Sections 4 and 5 of the Clayton Act establish *prima facie* by direct evidence its claim that the defendant cigarette manufacturers caused its exclusion from competition through the refusal of the distributors' controlled by them to buy, deal in, or distribute plaintiff's cigarettes rather than by circumstantial evidence sufficient to enable a jury to infer such exclusion, in view of the following circumstances:

Prior to institution of plaintiff's suit, the defendants were convicted of violations of the anti-trust laws, *The American Tobacco Co., et al.* v. *United States.*, 328 U. S. 783, 798, the jury in the antecedent criminal case having found merely on circumstantial evidence that the defendants had the power and intent to exclude competition in the tobacco industry, monopolized to a substantial degree the cigarette market and conspired to exclude undesired competition, to fix and control prices, and to fix and control other material conditions relating to the distribution and sale of cigarettes; the Government, however, not having offered any evidence and there being no direct determina-

tion that a competitor was actually excluded by being barred from the market?

(b) Is such a plaintiff not entitled, as part of its *prima facie* case, to present to the jury the final judgment of conviction in the criminal case, to establish by estoppel defendants' power and intent to exclude competition and, as to numerous other facts by collateral estoppel, to obtain as large an advantage as the estoppel doctrine would afford had the Government brought suit, in accordance with the rule of *Emich Motors Corp., et al.* v. *General Mortors Corp., et al.,* 340 U. S. 558, 568 and 569?

(c) Does such a plaintiff have the burden, as part of its *prima facie* case, to prove that the defendants caused the actual exclusion from the market of competitors other than the plaintiff, in the absence of a direct determination of that fact in the antecedent criminal case?

II. In making its *prima facie* case, was petitioner prejudiced by the action of the District Court

(a) striking out all of the testimony of Professor Tennant, an expert or well-informed person, and all exhibits received in evidence in the course of his testimony, which were offered by petitioner to demonstrate conditions in the cigarette industry and to assist the jury in finding petitioner's damages; and

(b) excluding testimony by Frank Riggio concerning sales of the Regents cigarette by the Riggio Tobacco Corp. and its net earnings?

III. Was dismissal of petitioner's complaint on the merits erroneous because

(a) the courts below made assumptions of fact and created a presumption of innocence in favor of the defendants and distributors of cigarettes, some of whom were called as hostile witnesses by petitioner;

(b) the courts below held that the conspiracy of which defendants were convicted could not be submitted to a jury to connect the defendants causatively with the refusal of the distributors to handle petitioner's cigarettes;

(c) in ruling on the sufficiency of the evidence to go to the jury the courts below excluded from evidence the ultimate facts found by the jury in the antecedent criminal case, of which this Court took note (328 U. S., at pages 798 and 803);

(d) the courts below, aside from any facts by estoppel offered by plaintiff and excluded from evidence, ignored the voluminous evidence of the good quality and salability of petitioner's cigarettes, the uniform acts of the defendants manifesting their concerted action and control of the distributors, and the uniform action of the distributors in refusing to handle petitioner's cigarettes, from which, as evidence introduced *de novo* at the trial (in numerous instances being identical with or very similar to the evidence at the criminal trial of defendants), the jury could make reasonable inferences from defendants' conduct, in light of the surrounding circumstances, as follows:

(1) petitioner's failure to secure distribution of its cigarettes was due to defendants' conspiracy, their control of the distribution system in the tobacco industry, and their direction to or tacit understanding with the controlled distributors that petitioner's brand of cigarettes specifically or as one of the class of brands in general, should not be

accepted for distribution without the consent or acquiescence of the defendants; or (2) was due to its own shortcomings, or circumstances beyond its control and that of the defendants;

(e) the courts below invaded the province of the jury by making conclusions of fact against petitioner to support their conclusion that it would be "to the last degree irrational" for the jury to infer that the defendants caused the distributors' refusal to deal with petitioner;

(f) the courts below erred in holding that petitioner had to show by *direct evidence,* such as admissions of the distributors that the defendants pressured them to refuse petitioner distribution, a causal connection between defendants' conspiracy and petitioner's exclusion from competition through the uniform refusal of distributors to handle its cigarettes, though in the antecedent criminal case the defendants had been convicted of their anti-trust law violations *solely on circumstantial evidence.*

Statutes Involved

Petitioner submits as the pertinent portions of the statutes involved the following sections of the Sherman Act and Clayton Act:

SHERMAN ACT

Section 1, Title 15 U. S. C. A.

"§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or

commerce among the several States, or with foreign nations, is declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, ch. 647 § 1, 26 Stat. 209; Aug. 17, 1937, ch. 690, Title VIII 50 Stat. 693.)"

Section 2, Title 15 U. S. C. A.

"§ 2. Monopolizing trade a misdemeanor; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, ch. 647, § 2, 26 Stat. 209.)"

Section 12, Title 15 U. S. C. A.

"§ 12. Words defined.

'Antitrust laws,' as used in sections 12, 13, 14-21, 22-27 of this title, includes sections 1-27, inclusive, of this title.

'Comerce,' as used in sections 12, 13, 14-21, 22-27 of this title, means trade or commerce among the several States and with foreign nations, * * * (Oct. 15, 1914, ch. 323, § 1, 38 Stat. 730.)"

CLAYTON ACT

Section 15, Title 15 U. S. C. A.

"§ 15. Suits by persons injured; amount of recovery.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendent resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, ch. 323, § 4, 38 Stat. 731.)"

Section 16, Title 15 U. S. C. A.

"§ 16. Judgment in favor of Government as evidence; limitation of actions.

A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendent has violated said laws shall be prima facie evidence against such defendent in any suit or proceeding brought by any other party against such defendent under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* This section shall not apply to consent judgments or decrees entered before any testimony has been taken.

Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of

action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof. (Oct. 15, 1914, ch. 323, § 5, 38 Stat. 731.)"

Statement of Case

Respondents' Conviction of Anti-trust Law Violations.

Petitioner brought its action for treble damages against the respondents after they had been convicted of unlawful combination and conspiracy in restraint of interstate and foreign trade and commerce in tobacco, monopolization of interstate and foreign trade and commerce in tobacco, and unlawful combination and conspiracy to monopolize interstate and foreign trade and commerce in tobacco, in violation of the Sherman Act, 15 U. S. C., Sections 1 and 2, on Criminal Information #6670 in the United States District Court for the Eastern District of Kentucky, said conviction having been affirmed by this Court, *The American Tobacco Company, et al.* v. *United States,* 328 U. S. 783.

The final judgment of conviction in that case was at Lexington, Kentucky, and is hereinafter referred to as the Lexington Judgment. The respondents contended in this Court that it was error to deny their motions for directed verdicts, because *there was no direct evidence of agreement,* or even of communication, by or among the alleged conspirators. This Court observed, however, that the criminal verdicts against respondents indicated that the results of their informal and flexible practices were so beneficial to them in protecting their common interests against those of competitors that (328 U. S. at page 793)

> "entirely from circumstantial evidence, the jury found that a combination or conspiracy existed among the petitioners from 1937 to 1940, with power and intent to exclude competitors to such a substantial extent as to violate the Sherman Act as interpreted by the trial court."

The Wide Departure of the Courts Below from Established Procedure in Treble-Damage Cases.

Nevertheless, the Court below has made a wide departure from the established procedure relative to the quality of evidence sufficient to sustain a *prima facie* case for a treble-damage plaintiff, by requiring the plaintiff to establish the cause of action by *direct evidence,* in face of the previous conviction of the treble-damage defendants for violations of the Sherman Act on *circumstantial evidence.*

The courts below have also construed Section 5 of the Clayton Act (15 U. S. C., Section 16) so narrowly as to deprive petitioner of the maximum *prima facie* evidence intended to be given to a treble-damage plaintiff by reference to a final judgment of conviction of Sherman Act violators; and have denied to petitioner the maximum advantage afforded by the estoppel doctrine, *Emich Motors Corp. et al.* v. *General Motors Corp. et al.,* 340 U. S. 558, 568-569.

The effect of the decision of the Second Circuit Court of Appeals affirming dismissal of petitioner's complaint, is, therefore, that as high precedent it creates confusion and uncertainty in the administration of the anti-trust laws and the prosecution of remedies by private suitors under those laws, because it conflicts with its own prior decisions in other cases, the decisions of this Court in the case of *Eastman Kodak Co.* v. *Southern Photo Material Co.,* 273

U. S. 359, 375, *Emich Motors, supra,* and other cases, and with a decision by the Court of Appeals for the Third Circuit, all of which are more fully adverted to hereinafter and in the Brief in support of this petition.

The importance of the *Questions Presented* is not limited to the unique facts of petitioner's case, but involves questions of law of application to treble damage cases in general, which petitioner submits should be settled by this Court to avoid frustration of the intent of Congress to ease the burden of a small concern like petitioner by providing it with as potent and effective remedies as possible against the violators of the anti-trust laws.

In the *Emich* case this Court recognized this intent of Congress, and petitioner now urges that this Court take under consideration the distortion of the beneficial purpose of the Clayton Act and of established evidentiary procedures, to the distressing detriment of petitioner, in view of the nature of its claim.

Nature of Petitioner's Claim.

Petitioner's claim in substance was that the respondents as the major manufacturers of the burley tobacco type of cigarette effectuated the monopolization of interstate and foreign trade and commerce in tobacco products and their conspiracy to monopolize such commerce in tobacco products by so dominating and controlling the distributive mechanism of the tobacco industry that they caused the distributors to refuse to buy, deal in or accept for distribution petitioner's at least equally good quality, non-burley, salable cigarette with the result that petitioner was prevented from competing with the respondents and was forced to suspend its operations.

In 1938, which was during the period of operation of respondents' conspiracy as charged by aforesaid Information #6670, petitioner was organized as a New York corporation. It had some fifty stockholders and capital of $25,000. In the spring of 1939 it started to sell its Monticello cigarettes and smoking tobacco.

Previously, in 1937, Frank Riggio had severed his connection with respondent, The American Tobacco Co., as its director of sales and had organized the Riggio Tobacco Corporation. Frank was the son of respondent Vincent Riggio, who served American over a period of some forty years in various capacities, including President of the corporation, and who was convicted at Lexington with the other respondents.

The Riggio Tobacco Corporation manufactured the Regents cigarette of which it secured distribution in 1939 and subsequent years by the controlled distributors of the respondents at the very time that they refused distribution to petitioner's Monticello cigarette, notwithstanding it was being ordered by the retail outlets served by the distributors.

Petitioner predicated its complaint on the Criminal Information on which respondents had been convicted at Lexington and attached a copy of it as exhibit "A" (R. 6-36, 34-65). It also attached to its complaint as exhibits "B", "C" and "D" copies of the documents showing that after the decision of this Court, the judgment of conviction had become final. The allegations of the complaint were substantially identical with those of the Criminal Information (R. 13-18, 6, 35, 47-52, 24-26, 54-56, 28-30, 61-63, 13 f. 39; 24, f. 72; 28-29 f. 87; 25, f. 74-75; 29 f. 86-89, 16 f. 37-48; 16-17, f. 50-53).

Should certiorari be granted, petitioner in its brief will more fully summarize the allegations of its complaint but, summarily stated, its claim was in substance as follows;

The effect of the violations of the anti-trust laws charged by the Criminal Information against the respondents was to make the income of petitioner and other manufacturers of tobacco products lower than it otherwise would have been, and with respect to the petitioner's interstate and foreign trade and commerce in tobacco products, the effect was to cause the distributors controlled by the respondents to refuse to accept the tobacco products of the petitioner in inerstate trade and commerce and to refuse to distribute petitioner's tobacco products, with the direct consequence that petitioner was unable to distribute its products except in negligible quantities, and was unable to distribute them at a profit so that it was compelled to curtail its production and distribution, and lost sales and profits which it otherwise would have made in fair competition, to its substantial damage, the amount of which was to be found by the jury (R. 18-20, f. 54-49; 26-27, f. 76-81; 30-32, f. 88-93; 217, f. 650).

The Position of the Respondents.

At the trial and in the court below, the respondents maintained in substance that they did not cause the distributors to refuse distribution to petitioner; that the final judgment of conviction was not available to petitioner as *prima facie* evidence under Section 5 of the Clayton Act because the Criminal Information alleged a number of means employed by respondents to effectuate the conspiracy, and from the general verdicts rendered by the jury it could not be determined what means the jury found the respondents employed

to effectuate their conspiracy; and that the conspiracy with which respondents were charged at Lexington dealt merely with price-fixing and price control and not with the exclusion of competitors, with the result that the final judgment of conviction could not serve to provide by estoppel evidence of the exclusion claimed by petitioner. Contending that there was no evidence to show that they actually excluded petitioner or other competitors, and that petitioner failed because of its own inadequate management, the respondents asserted that the petitioner had not adduced against them evidence sufficient to make a *prima facie* case.

The Two Types of Evidence Offered by Petitioner to Make Its *Prima Facie* Case.

Though at the outset of the trial petitioner attempted to secure as large an advantage as the estoppel doctrine would afford had the Government brought suit, *Emich Motors Corp., et al.* v. *General Motors Corp. et al., supra,* it was forced during the more than ten weeks of trial to adduce its own evidence to establish *de novo* the conspiracy of which respondents had been convicted at Lexington, before the trial court would admit into evidence the Lexington judgment (PX 59, R. 3291).

By the time the Lexington judgment was finally received in evidence, petitioner had obviously made a *prima facie* case of conspiracy against the repondents because all of petitioner's witnesses had testified, with the exception of Donnell whose testimony was later read from the Lexington Record, Peper, whose deposition was read, Hollingsworth, Lasley and Tennant, whose testimony had commenced but was not complete, and all of petitioner's exhibits (PX 1-220 inclusive) had been ruled on by the trial court and for the most part received in evidence.

Thus petitioner without benefit of numerous evidentiary facts by estoppel from the Lexington record, had adduced its own evidence to establish *prima facie:*

(1) A combination and conspiracy by the respondents to control distribution and exclude actual and potential competitors in the tobacco industry, in substance as charged by the Information at Lexington and found by the jury there;

(2) The impact of the combination and conspiracy on petitioner, with the consequence that distributors refused to handle its cigarettes and smoking tobacco so that petitioner was excluded from competing with the respondents.

Lexington Judgment Admitted for Limited Effect After Testimony by Individual Respondents Admitting Their Conviction.

Petitioner's evidence *de novo* included a great deal of matter that was not presented to the jury in the Criminal case at Lexington, and the Trial Court admitted the Lexington judgment into evidence only after the respondents Riggio, Andrews and Hahn, called as adverse parties by petitioner, had admitted that they had been convicted of the violations of the anti-trust laws charged by the Criminal Information at Lexington (R. 917-919; 898-901; 1121-1122). Even then, the Lexington judgment was admitted with instructions to the jury that the only effect they could give to it was the fact that the respondents had been convicted of unlawful combination and conspiracy in restraint of trade, monopolization of and conspiracy to monopolize, interstate and foreign trade and commerce in tobacco; in other words, the bare, general charges of the Criminal Information that

respondents had violated the anti-trust laws (R. 899-900, ff. 2697-8; 901, ff. 2701-2; 3291, 3294-5).

Petitioner would, therefore, emphasize that the erroneous dismissal of its complaint is actually in face of the evidence adduced by petitioner and received by the Trial Court, and is not confined merely to the refusal of the courts below to grant to petitioner the maximum *prima facie* evidence to which it was entitled under Section 5 of the Clayton Act.

It is the position of petitioner that, independent of the numerous facts that it might have presented to the jury through instructions of the Trial Court as to the effect of the Lexington judgment, which were not accorded to petitioner, it adduced uncontroverted *prima facie* evidence sufficient to require submission of the case to the jury. Much of petitioner's evidence was identical with or substantially similar to the evidence adduced by the Government in the Criminal trial at Lexington, but, on the other hand, a considerable portion of petitioner's evidence was completely new, particularly in respect to petitioner's competition with the respondents and their motives for excluding it. The substance of petitioner's evidence is hereinafter summarized.

As Evidence of Respondents' Conspiracy, Power and Intent to Exclude Competitors, the Lexington Judgment Was Properly Offered.

At the outset of the trial petitioner sought, through its offer of the Lexington Judgment, to establish respondents' conspiracy to exclude competitors by controlling the distributive system and their power and intent to exclude actual and potential competitors, but was refused by the trial court (R. 120-3, 137-8, 168-9, 169-177, 183-4, 192-4). So con-

firmed was it in its view that petitioner could not advance the judgment as part of its chain of proof of exclusion by respondents, that at the time of admitting this final judgment of conviction for very limited effect, the trial court stated to the jury that it established *only* that respondents had combined to acquire or maintain the power to exclude by price-fixing, actual and potential competitors *other than the petitioner, Monticello Tobacco Co.* (R. 3291, 3294-5).

The case of *The American Tobacco Co. et al.* v. *United States, supra,* did *not* as a matter of fact or law determine that there had not been an actual exclusion of competitors by the respondents. The only question which this Court accepted for review in that case was, whether it was necessary for the Government to establish the actual exclusion of a competitor by the respondents in order to obtain their conviction for the crime of monopolization under Section 2 of the Sherman Act (328 U. S., p. 704). This Court did not disturb the findings, determinations and judgments of the courts below, but merely held that offer of proof of an actual exclusion was not necessary to establish monopoly and the respondents' intent to exclude competition (328 U. S., pp. 810, 813-815).

In so holding this Court (328 U. S., pp. 811-12) approved the following statement in the opinion of the Second Circuit Court of Appeals in the case of *United States* v. *Aluminum Company of America,* 148 F. 2d 416:

> "It insists that it never excluded competitors; but we can think of no more effective exclusion than progessively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel."

Petitioner maintained the position that in consonance with the foregoing exposition of "effective exclusion", it was "excluded" or the victim of "exclusion", because under the Clayton Act, Section 13 (a), 15 U. S. C., the respondents had violated the prohibition of the statute: "to prevent competition", potential or actually embarked on by a newly born business enterprise.

Petitioner took the position, therefore, that all facts were available to it from the Lexington Record to establish respondents' control of distribution of tobacco products and their intent to exclude competitors in the tobacco industry, as evidence from which the jury could infer their preconceived exclusion of petitioner as a potential or actual competitor, against which they conspired with intent to exclude and succeeded in excluding through their control of the distributive mechanism of tobacco products (R. 122-26, 131, 133-38, 146-8, 156-8, 160-162).

The narrow effect given by the trial court and the court below to the Lexington judgment deprived petitioner of the maximum *prima facie* evidence available to it according to the intent of the Clayton Act, Section 16, Title 15 U. S. C., and petitioner was restricted to an abortive *prima facie* case, with the consequence that its available proof was constrained to less than the full cause of action pleaded in its complaint; especially as the Criminal Information (Exhibit "A" attached to Complaint) set forth the intent and uniform acts of the respondents to control the sale and distribution of cigarettes and tobacco products on a national scale, and the intent to maintain a monopoly for the purpose of excluding actual and potential competitors individually and as a class.

Denial by Courts Below to Petitioner of the Ultimate Facts Determined by Lexington Judgment.

During the course of the long trial, petitioner sought to have admitted into evidence, by means of instructions to the jury, the following ultimate facts which this Court in its opinion in *The American Tobacco Company* case, *supra,* observed that the Lexington jury had found:

> That the respondents conspired to fix prices and to exclude undesired competition in the distribution and sale of their principal products (328 U. S., p. 803).
>
> That the respondents conspired to monopolize to a substantial degree the tobacco leaf market and the cigarette market, and to fix and control prices and other material conditions relating to the distribution and sale of the products of leaf tobacco in the form of cigarettes (328 U. S., p. 798).
>
> A power and intent upon the part of the respondents to exclude competition to a substantial extent in the tobacco industry (328 U. S., p. 798).

Petitioner attempted to rely on the estoppel doctrine as much as possible and to secure from the opinion of this Court in *The American Tobacco Co. case, supra,* and the opinion of the Sixth Circuit Court of Appeals in that case (147 F. 2d 93) all facts demonstrating the respondents' control of distributors and their intent to exclude competitors in the tobacco industry. Specifically in this regard, petitioner offered page 113 of the Report of the Sixth Circuit Court of Appeals opinion, to show how dealers were under the compulsion of the respondents and yielded to their demands because they felt the business necessity of carry-

ing the cigarette brands of the respondents, but it was excluded (PX 60 Id., R. 847).

With respect to the Fourth Count (conspiracy to monopolize) of the Criminal Information, this Court observed that though there was no issue of fact or question as to the sufficiency of the evidence before it, it was necessary to summarize the principal facts of respondents' conspiracy to monopolize certain trade, as charged in the Fourth Count and said (328 U. S., at p. 789):

> "* * * These facts demonstrate also the vigor and nature of the intent of the petitioners to exclude competitors *in order to maintain that monopoly if need or occasion shall offer itself to attempt such an exclusion*". (Petitioner's emphasis).

The trial court refused, however, to recognize the above-mentioned ultimate facts, or any other evidentiary facts established at Lexington, as appropriate evidence for the jury on the issue of respondents' exclusion of petitioner from competition. Petitioner was, therefore, compelled to prove *de novo* the same pattern of concerted action by the respondents that had already been established by circumstantial evidence at their criminal trial. This proof *de novo*, together with the other original evidence of petitioner, which had no forerunner at Lexington, was urged upon the courts below as sufficient to raise issues of fact for determination pursuant to the reasonable inferences by the jury.

The Substance of Petitioner's Evidence Warranting Submission to the Jury.

The opinion of the court below leaves the impression, however, that there was nothing in the trial court from which a jury could reasonably infer that the respondents

caused distributors to refuse to handle petitioner's cigarettes. The very brief reference to a few facts, apparently considered to be unfavorable to petitioner, and the lack of attention to the weight of the voluminous uncontroverted evidence from which the jury could infer numerous facts most favorable to petitioner (e.g. the quality of its cigarette, the adequacy of its management, the subservience of the distributors to respondents) present a most incomplete picture of the situation.

Accordingly, though petitioner does not pray the privilege of certiorari to secure this Court's determination of the particular facts of its case, it believes that it is essential for this Court to be apprised of the substantial evidence, which raised factual issues that could be reasonably resolved by the jury.

If this Court issues certiorari, petitioner will set forth in its Brief a comprehensive statement of facts with references to supporting pages of the Record. Petitioner believes that at this point it is not necessary to burden this Court with the more exhaustive examination of the Record which it might be disposed to make, upon hearing oral argument and reading the briefs of the parties, after the granting of certiorari.

Respondents' Control of Distributors.

The admissions of the individual respondents, called as adverse parties by petitioner, brought before the jury the fact that they had been convicted of conspiracy in restraint of trade, monopolization, and conspiracy to monopolize, relative to interstate and foreign trade and commerce in tobacco. The subsequent admission of the Lexington judgment established that fact as to the corporate respondents.

From the testimony of the individuals and petitioner's exhibits, there was also uncontroverted evidence that the corporate respondents controlled jobbers, chain stores and large retailers by the device of the "direct list", which meant persons to whom they sold their cigarettes directly, at the same wholesale price, and at a discount of 10% and 2%. The respondents would remove from their direct list any customers who would buy cigarette brands at the same price and discriminate against a brand of the respondents by selling it at a higher or lower price. It was a serious thing to be removed from the direct list, and over a long period of years respondents had not found it necessary to remove customers from their direct list very often, though such well-known organizations as United Cigar Stores and the Daniel Reeves stores had been removed and reinstated after compliance with respondents' requirements.

By the testimony of the individual respondents as adverse parties, and through copies of many of the Government's exhibits which had been received in evidence in Lexington, petitioner also adduced before the jury a collocation of circumstances establishing *prima facie* conspiracy by the respondents as follows:

I. The direct list customers of the corporate respondents were virtually identical.

II. The wholesale list prices of the corporate respondents were identical from 1928 to 1946.

IIII. The corporate respondents changed their list prices simultaneously.

IV. The trade and cash discounts of the respondents American Tobacco, Liggett & Myers, and Reynolds, have been identical since 1928.

V. Changes of the corporate respondents' list prices have no relation to cost of production or economic conditions.

VI. Respondents dictated the wholesale and the retail prices of their products by utilizing "cut-raters".

VII. Respondents gave dealers direct list privileges of purchase, together with discounts, posters, advertising displays, free goods and inventory adjustments.

VIII. Respondents used threats and penalties to enforce compliance with their program, removing dealers from their direct lists, policing and dictating both wholesale and retail prices.

IX. In furtherance of their common plan to monopolize the industry, the respondents utilized and maintained identical trade associations.

X. The individual respondents were motivated by identical by-laws of their respective companies providing for payments to them of large bonuses based upon a percentage of earnings.

Petitioner's evidence also showed that the individual respondents, who were officers of the corporate respondents, knew each other and leading jobbers or distributors, whom petitioner approached, for some thirty to forty years. Respondents Vincent Riggio and Andrews had been employed by the respondent American for some years prior to the dissolution of the Old Tobacco Trust in 1911 (*The American Tobacco Co. case, supra,* 328 U. S. 783, footnote at page 792).

The Metropolitan Tobacco Co. of New York City, a jobber which serviced 30,000 retail outlets and refused distribution to petitioner, had been doing business with the respondents for some 39 years dating back to the Old Trust,

and during the course of respondents' conspiracy held valuable cigar franchises from respondent American or its subsidiary American Cigarette and Cigar Co.

With particular respect to respondent American, it was demonstrated that it had control of the Metropolitan Tobacco Co. sufficient to cause the discharge of a branch manager of its subsidiary, New Jersey Tobacco Co., because respondent Riggio was dissatisfied with his handling of a promotion campaign for one of American's cigar brands.

Albert H. Gregg, head of Faber, Coe and Gregg, Inc., another large distributor of tobacco products, which refused petitioner, started his tobacco industry career some fifty years before trial with a subsidiary of the respondent American group and when his own business was incorporated in 1922, both the president of respondent American's subsidiary, American Cigarette and Cigar Co., and the president of respondent Liggett & Myers, purchased substantial blocks of its stock. Since his college days, Gregg was a personal friend of George Washington Hill, the president of American before respondent Riggio became its president. He was a director of respondent American from March 17, 1938 to November 29, 1939, from the middle thirties until 1940 or 1941 was on the board of its subsidiary, American Cigarette and Cigar Co., and for a number of years up to the time of trial, both he and Faber, Coe & Gregg, Inc. each owned several thousand shares of stock in respondent American or its subsidiary American Cigarette and Cigar Co. During the course of respondents' conspiracy, Gregg collaborated closely with Hill as president of respondent American concerning control of distributors of the products of American and American Cigarette and Cigar Co.

During the course of respondents' conspiracy and monopolization, there were 1,000,000 retail outlets for the sale of tobacco products, and approximately the same 6,000 distributors, dealers and large chain store organizations were on the "direct list" of the respondents American and Liggett & Myers. To reach the million retail outlets in the United States, all manufacturers, whether large or small, have to sell through jobbers or distributors, because no single manufacturer has an organization large enough for the purpose.

The distributors approached by petitioner were on the direct lists of respondents American and Liggett & Myers.

Petitioner as Respondents' Competitor for Public Taste.

Respondents were the major long established manufacturers of cigarettes made of burley tobacco or containing burley as a substantial component (see *The American Tobacco Case, supra,* 328 U. S., footnote 7 at pp. 792-3).

With its non-burley Monticello cigarette, first offered for sale in the spring of 1939, petitioner appealed to public taste for a mild, unadulterated cigarette of pure blended Virgina and Turkish tobaccos, free of artificial flavors and the large bitter weed known as burley. In each of its cigarette cartons, petitioner enclosed a "Statement of Facts" explaining how the burley cigarette caused husky throats, unpleasant aftertaste and disagreeable odor. Respondent Riggio admitted that when he was president of respondent American, he became aware of this competitive challenge, which emphasized that at the price for which the burley blends were sold, the consumer could not expect better quality.

As early as 1931, respondent American manifested its sensitivity to competition from a pure, unadulterated to-

bacco brand, when it forbade Hartley (who became president of petitioner in 1938) to use the word "unadulterated" in promoting the sale of the Court cigarette, which American was manufacturing for him. The testimony of American's president, George Washington Hill, at the Lexington trial, which was read to the jury in the instant case, also showed that if in the competition to satisfy public taste, a new brand is manufactured that suits more than burley tobacco, the manufacturer will be forced to follow that development to compete.

With respect to price, the fact that petitioner's Monticello cigarette sold for 18¢ per pack retail, which was higher than the Lucky Strike brand of respondent American, would not deter American from enforcing its policy to keep consumers using Lucky Strikes. Hill's testimony demonstrated that whether the competing brand was small or sold at a higher or lower price than Lucky Strikes, would not deter respondent American from taking steps to correct what it called "discrimination" against Luckies; one example being the Raleigh cigarette, which at 20¢ per pack, sold higher than Luckies. Petitioner's Monticello cigarette was, therefore, clearly shown to be just as much an object of the respondent's "anti-discrimination" policy as Raleigh and other brands, even though they sold for less than respondents' brands.

The cigarette cartons of petitioner, first used in the spring of 1939, carried in bold red letters the slogan "For Your Pleasure". There was testimony that no other cigarette manufacturer had used this slogan prior to petitioner. Petitioner demonstrated respondent Liggett & Myers' appropriation of this slogan about six months later, by presenting to the jury the half-page advertisements of the

respondent Liggett & Myers in October, 1939, issues of New York World Telegram, advertising its Chesterfield cigarette and featuring the slogan "For Your Pleasure".

No other cigarette carton displayed as much advertising matter and specification of the product as the carton of petitioner.

The Quality of the Monticello Cigarette

Petitioner's cigarette was, according to the experience of customers, very nice, very mild and very pleasing to the taste, and a very good cigarette. In the opinion of its manufacturer, the Christian Peper Tobacco Co. of St. Louis, (founded 1852) it was a good cigarette, on which it thought petitioner would be able "to do a job" and with which it "had a chance to make a hit". According to Crean, a long-experienced tobacco merchant, and a small stockholder of petitioner, who handled it with increasing sales, it was an excellent cigarette, and one of the best on the market. Boyleston, a long-experienced tobacco salesman, representing petitioner, found it very mild, with no after-taste, and no bite. Petitioner's president, Hartley, had ordered from the Christian Peper Tobacco Co. a good cigarette with flue-cured tobacco and some Turkish, which petitioner got.

The quality of the cigarette and its higher retail price, afforded the dealer more profit on it than on other popular brands of the burley type, such as respondents' Lucky Strikes and Chesterfield, and Reynolds' Camels.

The cross-examination of petitioner's witnesses produced no evidence whatever to disparage the quality and salability of petitioner's cigarette in any way, and there was

no evidence to controvert the fine quality of the Monticello cigarette and its salability in various types of retail outlets.

The Adequacy of Petitioner's Management.

Petitioner's president, Richard G. Hartley, had long experience in the tobacco industry in various capacities, and caused the organization of petitioner, with a capitalization of $25,000 and offices at 655 Fifth Avenue, New York City, at a time when the trend of the cigarette market was upward. Arrangements were made with Leigh Chandler & Co., a New York brokerage firm, for sale of petitioner's capital stock. Pursuant to arrangements made by Hartley with the Christian Peper Tobacco Co. of St. Louis, Missouri, which was founded in 1852, that company manufactured for petitioner the Monticello cigarettes and smoking mixture from tobacco and other ingredients furnished by Christian Peper; petitioner supplying the cartons, labels and dies.

Between the first week in March and the middle of April, 1939, Christian Peper shipped petitioner 400,000 Monticello cigarettes, manufactured according to the formula and directions given by Hartley to that company. Hartley specified the blend and ingredients to be used, as well as the ingredients to be excluded, and there was no burley tobacco in the Monticello cigarette. Based on this first shipment of 400,000 cigarettes, Christian Peper, which had adequate leaf tobacco sources and warehouse facilities, could have readily produced 120 million cigarettes a year for petitioner, as the shipment represented nine or ten hours' production on only one cigarette-making machine. Its cigarette-making capacity to supply petitioner could have been easily increased and it had available the necessary labor.

Compared with the Riggio Tobacco Corporation, organized in 1937 by Frank Riggio, former director of sales of respondent American and son of respondent Vincent Riggio, petitioner was shown to the jury to have at least as much capacity for commencement of business and expansion. The Riggio Tobacco Corporation, while undertaking manufacture of its Regents cigarette itself with only one cigarette-making machine, made arrangements with the Universal Tobacco Co. just as petitioner did with Christian Peper, to obtain tobacco as needed; and it started business with capital of only $25,000 and "a mighty small" factory. That company did not actually start the manufacture and sale of its Regents cigarette until 1939, the same year petitioner commenced promotion of Monticello cigarettes and smoking mixture; Riggio Tobacco was given distribution while petitioner was refused.

On January 14, 1939, the New York Herald Tribune carried on its financial page a picture of Hartley and a story about the formation of petitioner for the manufacture and sale of cigarettes (PX 139). The jury was thus able to form some idea of Hartley's appearance twelve years before the trial and could appraise him on the witness stand.

Chandler, the broker who handled petitioner's stock issue, before undertaking that responsibility, received letters of recommendation from Hon. John W. Davis and from persons long experienced in the tobacco industry, attesting their personal knowledge of Hartley, his integrity, his good family connections in the leaf tobacco business and considerable knowledge of the tobacco industry, his punctuality in meeting his obligations, and even from employees of respondent American Tobacco Co., the statement that all of the relations of that company with Hartley had been satisfactory.

There was also uncontroverted evidence of his experience with the buying and selling of leaf tobacco, the retail merchandising of leaf tobacco products, his 1931 promotion of the Court cigarette, of which Faber, Coe & Gregg and other jobbers who in 1939 and later refused distribution to Monticello cigarettes, had bought substantial quantities. Hartley withdrew the Court cigarette from the market because the formula was not what he had expected and he was not satisfied with the package. · Experienced tobacconists of many years' standing and prominent in tobacco trade organizations testified as to Mr. Hartley regarding his personality, his sales talk, and to the economic fact in the tobacco industry that the *securing of distribution outlets preceded the advertising of the product;* also, to the facts that Hartley was a good salesman, his securing of 56 orders for 67,000 Monticello cigarettes in one week being an efficient selling job, and that petitioner's cigarette package was attractive, and had eye appeal compared with the packages of other manufacturers.

Petitioner's stockholders included persons of substance, and in this connection petitioner would note that the trial court excluded evidence of ability and readiness of stockholders to make further investment in the capital stock of petitioner, if it could get distribution of its products. Chandler, the broker, who became a stockholder of petitioner, had had experience in interesting investor-clients in tobacco securities, some of whom also became stockholders of petitioner.

Petitioner's procedures to promote its cigarette and smoking mixture were sound according to the testimony of experts, one of whom had long experience in the tobacco industry as the operator of retail stores and as a sales pro-

motion manager for the Philip Morris Co., and the other of whom was a business engineer, whose experience included consultation to a number of the leading companies in this country, including some dealing in food products and distributing their products in channels through which cigarettes were also distributed. According to Hollingsworth, whom the trial court regarded as a substantial witness, with knowledge of Hartley's ablity (R., ff. 10142-43), it was necessary to obtain distribution of a new cigarette before attempting extensive advertising of it. In its first year of operations, petitioner did little advertising, as was the case with the Riggio Tobacco Corp. in its first year, notwithstanding that company succeeded in getting distribution of its Regents cigarette in substantial amounts.

That petitioner did not attempt the impossible in competition, so far as costs were concerned, was corroborated by Professor Tennant of Yale, author of the book, "The American Cigarette Industry", excluded from evidence (PX 184 Id.). Tennant testified to the effect that the unit costs and expenses would be no greater for a small cigarette manufacturer than they would be for a large manufacturer. His testimony, charts and tabulations were based on the experience of the five major companies in the tobacco industry (including respondents) which compositely had 90% of the industry's sales. Petitioner's costs and its profit per thousand cigarettes for the first year of operation, were known, and, allowing for the fact that its costs would have increased at the same ratio as the costs of other manufacturers, the assumption was made that in subsequent years the same differential between sales and cost price would obtain, in conformity with the O. P. A. method of maintaining past profit ratio. In his testimony concerning petitioner's

operations, Tennant made the assumption of "an ordinary degree of management".

Neither by cross examination of petitioner's witnesses, nor in any other manner, did respondents bring before the jury any evidence that the steps taken by petitioner to secure distribution were not normal or were unsound, or that petitioner's management was not *at least* of reasonable competence.

Sales Promotion of Petitioner's Cigarette

Petitioner arranged with several long-experienced tobacco and cigarette salesmen to promote the sale of Monticello cigarettes and smoking mixture. They knew many retailers personally and the best locations in New York City to select for "high-spotting", meaning promotion of tobacco products in cigarette and cigar stands located where quality merchandise could be sold. Customers were "sampled" by being handed cigarettes to smoke in the presence of the operators of the stands. Their reaction to the cigarette was favorable, and the owners or operators of the stands placed orders for petitioner's cigarette with their regular jobbers or distributors, pursuant to the trade practice either to fill out requisition sheets furnished to them by jobbers, and on occasion even to telephone orders to them. A customer a day for a retail stand would mean a carton a week or 52 cartons a year, and would be absolutely enough to induce the dealer to stock the cigarette. The object of petitioner's salesmen at the outset was to get the retail dealers to take at least one carton. The dealers were not particularly "fussy" and would sell a cigarette if they had a demand for it.

Many orders were placed by dealers with Metropolitan Tobacco Co. and other jobbers regularly servicing them, but when petitioner's salesmen returned to the dealers a week or so later, they found that the jobbers had not filled the orders. The established trade practice in the tobacco industry is for retailers to order all their cigarette requirements, other tobacco products, and sundry items such as candy and chewing gum, from jobbers who secured their stocks directly from the respondents and other manufacturers. The manufacturers did not sell or ship their products directly to the retail outlets, of which there were approximately 1,000,000 in the United States, serviced by some 6,000 distributors.

Petitioner's evidence also established that long-experienced tobacconists handled Monticello cigarettes, received repeat orders from their customers, but could not get them from the Metropolitan Tobacco Co., or from its subsidiary, the New Jersey Tobacco Co.

Refusal of the Jobbers to Give Petitioner Distribution.

Hollingsworth estimated that petitioner could have sold 120,000,000 Monticello cigarettes in its first year, if it had gotten distribution (R. 3451). In 1939, the first year Riggio Tobacco Corporation offered its Regents cigarette, it sold 100,000,000, with Frank Riggio as its only salesman. Testimony by him as to his company's sales for subsequent years was excluded (R. 1851, f. 551; 2773-74, 2780-82, ff. 8344-45) and petitioner submits this was error.

Petitioner's president, Hartley, early in 1939 was persistent in his efforts to get Metropolitan Tobacco Co., servicing 30,000 retailers, to accept orders for the Monti-

cello cigarette from its customers. Metropolitan was requested merely to fill the orders, which petitioner undertook to procure, and the distribution by Metropolitan would require no investment by it. The mere filling of the orders from its customers would yield to Metropolitan (and all other jobbers) discounts of 10%, 5%, and 2%, which were more than respondents' brands afforded. After being put off on several occasions by Mr. Katz of Metropolitan, he finally, on October 12, 1939, wrote Metropolitan a letter (PX 107 Id.), excluded by the trial court, in which he informed Metropolitan that petitioner was in position to turn over orders for his products to Metropolitan from its regular customers, that petitioner planned to cover New York, New Jersey and the New England states thoroughly with salesmen, and requested Metropolitan to accept the orders, inasmuch as petitioner was receiving calls at its office from consumers inquiring where they could purchase petitioner's products. This letter also pointed out that Metropolitan had not yet accepted an order for petitioner's products. Though Katz, who subsequent to 1939 became president of Metropolitan Tobacco Co., testified that he had been unable to find the original of this letter in the files of Metropolitan, he did not deny Hartley's testimony that after this letter was sent, Hartley had discussed it with him (R. 2038-2044, 2048-2049, 1804).

Katz testified that he could not recall as to whether or not he had ever smoked a Monticello cigarette, but that Metropolitan did not refuse to buy or distribute Monticellos because of any inadequacy of the cigarettes, their package, or the cartons in which they were sold (R. 1821-23). Over petitioner's objection, he testified on cross examination that Metropolitan did not handle petitioner's products because

its directors thought they could not make money on them; but at no time did Katz, who had been called as a hostile witness by petitioner, claim that in 1939 or at any later time this reason for not handling petitioner's cigarettes and smoking mixture was given to Hartley (R. 1813-14). Metropolitan did, however, buy in substantial quantities the Regents cigarette of Riggio Tobacco Corporation at the time that Monticello was being refused (PX 106, 109), and its subsidiary, New Jersey Tobacco Co., even conducted a specialized distribution campaign for Regents (R. 1447-48). Kimmerly, a former branch manager of New Jersey Tobacco, testified that, although he had calls for Monticello cigarettes, he could not handle them because it was an "outside brand" (R. 1446).

There was also uncontroverted evidence that respondent Vincent Riggio was definitely interested in seeing that Riggio Tobacco Corporation succeeded with its Regents cigarette, and expressed himself as appreciative of help that his son Frank, a witness called by petitioner, and his other son, Louis, were receiving from the retailers to start the brand. Respondent Riggio had, however, testified that he never discussed Regents with anyone (R. 1558-59, 1560-62). The subject of the Regents cigarette was also discussed by George Washington Hill, American's president, and respondent Hahn, a vice-president, who since April 1951 was president of American. Hahn, at the time of the trial was also president of American's subsidiary American Cigarette and Cigar Co. (R. 1273, 1101-4).

Petitioner's president, Hartley, was familiar with the operation of the different kinds of cigar and cigarette stands owned or controlled by Faber, Coe & Gregg, having helped that company break in clerks in years past, and for many

years knew the executives and employees of that company. He approached Both, President, and Schofield, Vice President, as soon as petitioner received its first shipment of cigarettes from Christian Peper, but they said they couldn't buy any, even though petitioner's price, after 10% trade discount, 5% special discount and 2% cash discount, was $6.37 net per 1760 cigarettes, giving Faber, Coe better profit than respondents' brands.

Hartley laid orders (PX 103) from 63 leading hotels and clubs in New York City on Both's desk, requesting the filling of at least a few, because the accounts ordering, as buyers of all their merchandise at Faber, Coe, could not buy elsewhere. In addition to the orders indicated in PX 103, others were sent in to Faber, Coe & Gregg by telephone or on regular weekly forms used by the stands. He also had orders from stands in office buildings and restaurants, and told Both that the amounts of merchandise indicated were wanted. In some cases, though the orders were written down or telephoned in Hartley's presence, they were either not filled by Faber, Coe & Gregg, or were filled for less than the amounts ordered. Hartley actually rechecked every order and found that the operators of the Faber, Coe & Gregg stands had not had their orders filled. Eventually Faber, Coe & Gregg did stock Monticello cigarettes in their warehouse, but over a period of two years its purchases were less than $300.00, and it would not receive the cigarettes for distribution, in one instance informing a restaurant which ordered them, after seeing them at a Faber, Coe & Gregg stand, that it was not available through Faber, Coe & Gregg to its established wholesale straight accounts (PX 94).

Neither Gregg nor Schofield had anything disparaging to say about petitioner's cigarettes and smoking mixture, its management, or its methods of attempting to secure distribution.

Crean, who operated a stand at the Fiske Building, 250 West 57th Street, New York City, heard about Monticello cigarettes from a customer in his building, who thought them a very good cigarette. He ordered several cartons from his supplier, Faber, Coe & Gregg, and on reorders of two or three cartons, he received delivery from Faber, Coe for the first two months. As sales increased he displayed Monticello cigarettes on the top of his case, and began to order by the thousands (5 carton lots) because Monticello's were getting consumer acceptance, but Faber, Coe would send him only two cartons and back order him for three. His sales increased to the point where he had to have at least a thousand or two thousand Monticellos on hand, so he telephoned Faber, Coe & Gregg's shipping department, explaining he was losing sales and was told "you will get them when we get them". On one occasion when Crean told Joseph Laven, representative of Faber, Coe & Gregg, what a good cigarette Monticello was, he was asked what he was doing with that "so and so up there" referring to a Monticello carton on Crean's showcase. Crean explained that it was selling well, he had lots of customers for it, but his difficulty was his inability to get them and Laven "finished up with a laugh" (R. 279-80).

His inability to obtain Monticello cigarettes from Faber, Coe & Gregg led to his making the acquaintance of petitioner's president, Hartley, because he finally had to call petitioner's office to get 2000 cigarettes needed by him, and Hartley delivered them personally (R. 280-284). Though

he continued to order Monticellos from Faber, Coe & Gregg, he never received any more, and ordered Monticellos directly from Hartley in 2000 to 5000 cigarette lots until he gave up his stand. While petitioner was supplying Crean directly with Monticello cigarettes, he tried to get them from Metropolitan Tobacco Co., but received neither the cigarettes nor an explanation from Metropolitan.

The fact that the New York jobbers who distributed respondents' brands would not fill orders for Monticello cigarettes from their regular retail customers, was demonstrated by the testimony of Crean and Hartley in substance as follows: Crean, posing as one of petitioner's salesmen, on a Saturday afternoon went with Hartley from 57th Street up Broadway to 76th Street and back in New York City, and during a three hour period obtained about 30 retail stores' orders for 50,000 Monticello cigarettes. He then told Hartley to try and deliver these orders through the jobbers. Returning the following Saturday afternoon with Hartley to the same retailers, who were all store keepers carrying all the leading cigarette brands, they found that none of them had received any Monticello cigarettes.

Crean could have sold 4000 Monticello cigarettes a week all through 1940 if he could have gotten all the Monticellos he ordered per week. Ordering them direct from petitioner was not as practicable as being able to get them, like the respondents' brands, from distributors like Metropolitan Tobacco Co., Faber, Coe & Gregg, and others. Irregular deliveries made him lose sales. Based on his experience with other brands and on the consumer reaction to Monticellos, the sales of Monticello cigarettes would have increased with the passing of time (R. 483-86, 489, 4191-2).

Prior to commencement of petitioner's action, a representative of respondent, The American Tobacco Co., visited Crean, who informed him that the Monticello cigarette had very good repeat business, and customers would be steady smokers of it, if they could purchase it at any other places than just Crean's stand. Crean also told this representative of respondent American that he felt that the Monticello cigarette would have had an excellent opportunity of becoming a very high type and good selling cigarette, because the consumer was looking for a mild brand (385-86, 389).

Also, Monticello cigarettes afforded a better profit incentive to the average retailer, because they were not "cut rate" or "underselling legitimate profit" (R. 389-90).

There was definite consumer acceptance of the Monticello cigarette, which was sold in establishments like the Schrafft's stores, Pennsylvania Drug stores, the Savarin Restaurant at the Pennsylvania Station, New York City and outstanding buildings like the Equitable Building, 120 Broadway, New York City. Chandler introduced it to clubs in New Jersey where it was well received and resulted in orders from New Jersey distributors. Neither Metropolitan Tobacco Co., Faber, Coe & Gregg nor other large distributors in New York City and Albany (where Hartley accompanied by Chandler went to promote the cigarette), nor other distributors in Philadelphia, Baltimore, Washington, Richmond and Norfolk, Virginia, and other places, would even fill the orders for Monticello cigarettes obtained by Hartley from retail outlets which were regularly serviced by them.

There was no evidence that the distributors, who were the "direct list" customers of respondents, refused to handle petitioner's products because of any criticism of, or defi-

ciency in, their quality, petitioner's management, Hartley individually, their price, acceptance by consumers, or petitioner's methods of marketing them.

After endeavors to secure distribution of its Monticello cigarettes and smoking mixture over a period of more than two years, which met with uniform refusal by the distributors, petitioner was forced to cease its efforts.

Development of, And Conditions In, Tobacco Industry

Particularly through the testimony of Prof. Richard B. Tennant of Yale (economics), whose book, "The American Cigarette Industry," contained many references to the record of the Lexington trial, petitioner presented to the jury a great deal of evidence from which it could get "some appreciation of the history and development of the cigarette industry," as essential toward understanding of the case (*The American Tobacco Co.* case, *supra,* 328 U. S., at p. 790). There were received in evidence a number of charts and tabulations, from which the jury could see the dominance of the respondents and other leading tobacco manufacturers, who had also been convicted at Lexington, as well as the costs of sales, expenses, operating profits and net income before taxes of the respondents. Sales figures of the various cigarette brands and the tobacco industry as a whole were presented together with graphs indicating the growth trends of new brands. Much of the exhibit evidence introduced through Tennant was based on figures established at the Lexington trial, as well as reports of the financial condition and operations of the respondents.

Because Prof. Tennant had not actually worked in the tobacco industry, though he had some experience with

tobacco figures in connection with services to the O. P. A., and had not personally visited and investigated the businesses of the respondents and others in the tobacco industry, the trial court struck out all of his testimony and the exhibits received in evidence through him, which petitioner will specify as error, *infra*. The volume of the Tennant testimony and the number and nature of the exhibits is apparent by reference to the Record, pages 3141 to 4053, and to the Index to the Record pages XIII to XVIII inclusive.

The background of the tobacco industry which petitioner attempted to lay before the jury through Tennant was, in substance, like the background developed at the Lexington trial, and was among those facts which the trial court refused to bring before the jury by instructions after the Lexington judgment was admitted into evidence.

From the testimony of Hollingsworth and Tennant, including tabulations prepared by Tennant, the jury had before it projections of petitioner's potential sales and the profits it could have made, had it secured distribution of its products.

Dismissal of Petitioner's Complaint and Invasion of Jury's Province By Courts Below

The trial court's dismissal of the complaint was plainly predicated on the view that the Lexington judgment could not be used to provide estoppel facts because it showed that respondents conspired only to fix and control prices as to competitors other than petitioner, and that, as a matter of fact, the respondents did not actually exclude competitors. Both with respect to the Lexington Record and all the evidence introduced *de novo* by petitioner, *the trial court held*

that the evidence showed that what petitioner claims was done to it in the way of exclusion, was never done to anyone else, and that there was, therefore, no basis for the jury to infer that respondents caused the exclusion of petitioner. The colloquy between court and counsel on motions to dismiss (R. 4240 to 4266) shows the attitude of the court, which is particularly evident from the Record at folios 12742-12744, 12746, 12761-12762, 12770-12776. It is clear that *the trial court assumed the innocence of the respondents, merely because evidence of actual exclusion of a competitor was not presented at Lexington,* assumed as a fact that respondents had at no time caused the exclusion of any competitor, and made rationalizations, which reflected the trial court's misconception of the meaning of *prevention of competition* or exclusion under the Clayton Act and judicial decisions, and which, in any event, were in the province of the jury.

Because *it seemed to the trial court* that respondents had no reason whatever to fear petitioner's operation in the tobacco field, it seemed to the court "to be to the last degree irrational to suppose that these five companies, the largest in all the world", would say to the distributors, though they never bothered before about 10 cent cigarettes and others that gave them trouble, that they were "just too much afraid to ever get" petitioner out on the market (R. 4254, 12762).

Numerous errors were made by the trial court relative to the admission and exclusion of evidence, but petitioner will keep these to a minimum in the *Specifications of Errors, infra.*

The court below, in affirming dismissal of petitioner's complaint, also invaded the province of the jury in respects designated in the *Specifications of Errors, infra.* That court

also sustained dismissal of the complaint on the grounds that the conspiracy proved against the respondents at Lexington dealt only with coercion of the distributors to maintain prices fixed by respondents; showed no coercion by respondents of wholesalers to stock certain brands; was effective as showing only previous concert or collusion of the defendants, but not as to their relevant effectuating practices, and no casual connection between such collusion and jobbers' refusal to handle petitioner's products was shown by direct evidence. These matters are covered in the *Specifications of Errors, infra.*

Thus, on trial and appeal, errors of interpretation of Section 5, Clayton Act, and of previous decisions of this Court, creation of a presumption of innocence for the respondents, assumptions of fact favoring respondents, and invasion of the jury's province, notwithstanding the presence of voluminous, substantial evidence supporting reasonable inferences that could be made by the jury, including those most favorable for petitioner on its claim of exclusion, led to the dismissal of the complaint.

SPECIFICATIONS OF ERRORS

Should a writ of certiorari issue, petitioner will urge that the Court of Appeals erred:

1. In holding that as to all matters not distinctly determined by the final judgment of conviction of the respondents at Lexington, petitioner had to adduce direct evidence, and could not rely on circumstantial evidence.

2. In holding that petitioner had the burden of proving by direct evidence any causal connection claimed by it between the respondents' conspiracy or collusion and the refusal of distributors of tobacco products to handle the products of petitioner.

3. In holding that petitioner had to establish by direct evidence, such as admissions, that the jobbers were pressured by the respondents to refuse to handle petitioner's products.

4. In holding that petitioner was not entitled, under Section 5 of the Clayton Act, to have the final judgment of conviction of respondents in evidence, to establish under the estoppel doctrine the conspiracy, power, and intent of the respondents to exclude actual and potential competitors in the tobacco industry.

5. In holding that the final judgment of conviction of respondents was not admissible in evidence to establish by collateral estoppel the various uniform acts of respondents as a basis for the jury to infer concerted action by respondents to exclude competitors.

6. In holding that in the criminal case against the respondents at Lexington there was nothing "indicating that the conspiracy was effectuated even there in a way that might have affected plaintiff".

7. In holding that the jury verdict against respondents in the antecedent criminal case at Lexington, was not firmly rooted in a finding that coercive conduct on the part of the respondents "made impossible the marketing

of petitioner's non-competing higher priced cigarettes", and, in so holding, making the factual assumption that petitioner's cigarettes were "non-competing".

8. In holding that, with respect to dealer domination by the respondents through maintenance of a distributive mechanism favorable to their products, the Lexington Judgment established that this meant "merely identical retail prices at a figure not more than 3¢ above competing lower priced brands".

9. In failing to hold that "exclusion" under the Clayton Act means prevention of competition by potential competitors or actual competitors newly entering the field.

10. By sustaining in effect the holding of the trial court that petitioner had the burden to prove that the respondents caused the actual exclusion from the market of competitors *other than the petitioner,* to make its *prima facie* case.

11. By sustaining in effect the trial court's factual assumption that the respondents did not direct, or have tacit understanding with, the jobbers approached by petitioner, not to distribute a competing brand, including petitioner's, without consent or acquiescence of the respondents.

12. By sustaining in effect the trial court's holding that the Lexington Judgment against respondents is in no way evidence that respondents did anything to cause damage to petitioner.

13. By sustaining in effect the trial court's ruling that the Lexington Judgment was evidence only to show that the respondents combined to exclude actual and potential competitors *other than the petitioner.*

14. By sustaining in effect *the trial court's ruling that the Lexington Judgment was evidence only of respondents' power and intent to exclude actual and potential competitors, solely by means of price fixing,* and in failing to hold that the Lexington Judgment established that *respondents conspired to fix and control other material conditions* relating to the distribution and sale of the products of leaf tobacco in the form of cigarettes.

15. By sustaining in effect the *trial court's factual assumption that the respondents never actually excluded competitors from the cigarette market,* and that the distributors were actuated by innocent motives in their actions toward petitioner, the effect of which was to give a conclusive presumption of innocence to respondents in the treble damage case, notwithstanding their conviction of anti-trust law violation in the antecedent criminal case at Lexington.

16. In failing to hold that "exclusion" under the Clayton Act means prevention of actual and potential competition, exercised either directly and specifically against petitioner or against petitioner as a member of the class of "competitors".

17. By sustaining the action of the trial court striking out all of the testimony of Prof. Tennant, offered as an expert or well-informed person, and all

exhibits introduced with his testimony, offered by petitioner on conditions in the cigarette industry and as assistance to the jury in determining damages.

18. By sustaining exclusion of the testimony of Frank Riggio relative to sales of the Regents cigarette by Riggio Tobacco Corporation in years subsequent to 1939, the net earnings of that corporation, and its operations generally, offered by petitioner as a comparative small business entering the field at the time petitioner did, and securing distribution of its product.

19. By sustaining in effect the trial court's action excluding from evidence exhibits offered by petitioner, to wit, PX 32 Id., PX 193 to 206 Id., inclusive, and PX 209 Id.

20. By sustaining in effect the trial court's disallowance of a question to respondent Andrews concerning any special deals that he or respondent Liggett & Myers had with jobbers.

21. By sustaining in effect the trial court's exclusion of a question to Hahn relative to the purpose of respondent American in selling its cigarettes to "cut-raters".

22. By sustaining in effect the trial court's exclusion of PX 60 Id. (P. 113 of the Report in the Sixth Circuit Court of Appeals opinion in *The America Tobacco Co., et al.* v. *United States,* 147 F. 2d 93) offered to show respondents' control of the distributors through penalties and their business necessity to have respondents' products.

23. By invading the province of the jury as follows:

(a) In effect finding as fact that petitioner's stock prospectus was false, absent the relevance of such fact (even if entirely correct, which is not conceded) to the issue of petitioner's exclusion from competition by the respondents;

(b) By finding as fact that Hartley made "an abortive attempt to market a 'Court' cigarette manufactured for him by American Tobacco Co.", and further finding that "otherwise there was nothing in his past as to either general business success or initiation into the cigarette market";

(c) By finding as a fact that petitioner proposed to market its cigarette without substantial advertising, notwithstanding the trial court's exclusion of testimony by Hartley concerning petitioner's "plan" to market its products;

(d) By finding as fact that petitioner's president Hartley was practically his own sales force, in face of the fact that petitioner also had other long-experienced sales representatives;

(e) By finding as fact that petitioner's president Hartley did not pursue direct sales to retailers "preferring to market through distributors", in the face of respondent Riggio's testimony that both large and small manufacturers had to use distributors, and Hartley's knowledge of the necessity of securing marketing through distributors;

(f) In effect making the fact conclusion from petitioner's record that no sustained management effort was made to market Monticellos on a continuing or permanent basis;

(g) Misapprehending the facts by stating in substance that Section 5 of the Clayton Act does not

permit use of a criminal judgment " 'to imply new wrong-doing from past wrong-doing' " the petitioner's case being based on exclusion in the course of respondents' conspiracy.

24. In holding that the Lexington conspiracy could not be submitted to the jury to show coercive conduct by the respondents and, to connect the respondents causetively with the refusal of the distributors to handle petitioner's cigarettes.

25. In holding on all of the evidence *de novo* actually adduced by petitioner, aside from facts by estoppel denied to it, that there was no evidence from which the jury could make a reasonable inference that petitioner was excluded from competition by respondents.

26. In holding that petitioner had to show by direct evidence, rather than by circumstantial evidence, that it was excluded from competition by the respondents.

27. By affirming the trial court's erroneous rulings, invasion of the jury's province, and dismissal of petitioner's complaint on the merits, there being no controverting evidence from the respondents.

REASONS FOR GRANTING THE WRIT

I. The Usual Reasons Acceptable to This Court Are Present

There is serious doubt as to the correctness of the decision of the Second Circuit Court of Appeals on questions important in the prosecution of remedies under the anti-trust laws, *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U. S.

212, 213. Said Court of Appeals by its present decision and prior decisions has created confusion in the application of Sections 4 and 5 of the Clayton Act, *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430, and the case involves general principles requiring pronouncement by this Court (*idem*, page 438). The province of the jury was invaded by the action of the District Court, which was affirmed by the Court of Appeals, *Moore* v. *Chesapeake & Ohio R. Co.*, 340 U. S. 573; *Goldman* v. *United States*, 245 U. S. 474, 477.

II. The Requirement of Direct Evidence to Make the Treble Damage Plaintiff's *Prima Facie* Case, Represents a Wide Departure from Established Procedure.

There appears to be no settled body of law postulating the production of *direct evidence*, instead of the customary collocation of circumstances or *circumstantial evidence*, for the plaintiff to be able to make a *prima facie* case, warranting submission to a jury for its inferences. On the contrary, the Second Circuit Court of Appeals, this Court, and the Third and Sixth Circuit Courts of Appeal have recognized that it is *rare indeed* when conspiracy that violates the anti-trust laws can be proved by direct evidence, and have held that circumstantial evidence is adequate (the cases referred to are cited in the Brief supporting this Petition). The present decision of the court below causes confusion by being in conflict with its own prior rule and with other cases, making uncertain the remedy available to the private suitor under the Clayton Act, and in effect challenging the supervision of this Court, *which has not heretofore laid down a general rule to the effect that, with respect to all matters not distinctly determined in the antecedent criminal case, the treble damage plaintiff must prove his case by direct evi-*

dence. The effect of the wide departure by the court below from established evidentiary procedure in this type of case, is to put a premium on the skillful concealment of concerted action and to impair the substantive cause of action conferred by the statute. The aggravated nature of this effect is apparent from the anomalous situation of the Government being required to adduce only circumstantial evidence to secure the final judgment of conviction, on which the private suitor may rely under the Clayton Act for as large an advantage under the estoppel doctrine as possible.

III. The Narrow Scope and Effect Given to Respondents' Final Judgment of Conviction, by the Court Below Conflicts with the Intent of the Statute and the Rule of This Court.

As the intent of Congress in the Clayton Act was to minimize the litigation burden of the small, private suitor, who was victimized by violators of the anti-trust laws, and this Court has held in the *Emich Case, supra,* that the intent was to give such litigant the benefit of *all* matters of fact and law necessarily decided by the antecedent judgment of conviction, and as large an advantage as allowable under the estoppel doctrine, subject only to the right of the defendant to his day in court, the action of the court below in severely restricting the probative effect of the Lexington Judgment, distorts the purpose of the Act, and as high precedent, if allowed to stand, will affect in general all cases brought under Sections 4 and 5 of the Clayton Act. The numerous respects in which the final judgment of conviction was limited, have been set forth *supra,* but petitioner would emphasize that it should at the very least have been available to establish the ultimate facts of respondents' conspiracy, power and intent to exclude competitors, pursuant to this Court's observation in *The American Tobacco Case, supra,* 328 U. S., at pages 798 and 803.

IV. The Court Below Invaded the Jury's Province, Despite the Presence of Substantial Evidence Raising Issues of Fact for Decision by the Jury.

The action of the court below had the effect of giving the respondents a presumption of innocence, contrary to this Court's rule in the *Eastman Kodak Company Case,* referred to in the supporting Brief. Of general importance also in this connection, was the burden imposed on petitioner to prove that the respondents excluded *others,* while simultaneously excluding the evidence offered by petitioner to show the experience of Riggio Tobacco Corporation, comparable in size to petitioner, and which the jury could infer had the door of the respondents' monopoly opened to it because of its president's previous connection with the respondents.

In the *Statement of Case, supra,* and in the *Specifications of Error, supra,* petitioner has set forth the many invasions of the jury's province by the courts below. To effectuate the intent of Congress under the Clayton Act, this Court should pronounce that *circumstantial evidence* should suffice to establish *all* elements of a treble damage case, and that the province of the jury should not be invaded by the trial court merely because the plaintiff is unable to adduce direct evidence, due to the skillful concealment of the anti-trust law violator.

CONCLUSION

This case raises important general questions of law under the anti-trust statutes, and under prior decisions of this Court, which have been misconstrued or entirely ignored. It affects not only petitioner, but treble damage plaintiffs in general. The rule on direct evidence laid down by the

court below conceivably affects the general law of evidence in conspiracy cases. The focus of the court below on the estoppel aspects of the case, and its ignoring of petitioner's substantial evidence *de novo* also raises an important question of law. The subject matter is such that petitioner believes that this Court, in performance of the duty of administering justice, should exercise its discretion for issuance of a writ of certiorari to the Court of Appeals for the Second Circuit in respect of the questions presented by this petition.

Dated, New York City,
September 16th, 1952.

Respectfully submitted,

PHILIP HANDELMAN
Counsel for Petitioner

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

PHILIP HANDELMAN being duly sworn, deposes and says; that he is duly admitted to the Bar of this Court, and is attorney and counsel for Monticello Tobacco Company, Inc., the petitioner in the foregoing Petition for Writ of Certiorari; that he has read said petition and the contents thereof are true, except as to those matters alleged to be upon information and belief, and that as to such matters, he believes it to be true.

.....
PHILIP HANDELMAN
Counsel for Petitioner

Sworn to before me this
16th day of September, 1952

.....
Notary Public

LAURENCE FELDMAN
NOTARY PUBLIC, State of New York
Qualified in Bronx County
No. 03-1185650
Cert. filed with New York & Bronx Co. Clk. & Reg.
Commission Expires March 30, 1953

BRIEF IN SUPPORT OF PETITION

Opinion Below

The opinion of the Court of Appeals for the Second Circuit, not being reported yet, is printed in the Record at pages 4289 to 4297 inclusive. No opinion was written by the District Court.

Jurisdiction

The judgment of the court below was entered on June 19, 1952, and the statutes and rules under which the jurisdiction of this Court is invoked, are set forth at the outset in the Petition.

Questions Presented

The questions presented are stated in the Petition, immediately preceding *Statutes Involved* and directly after *Jurisdiction* in the Petition.

Statutes Involved

The Sherman Act, Sections 1, 2, and 12, Title 15 U. S. C., and the Clayton Act, Sections 4 and 5, Title 15 U. S. C., Sections 15 and 16, are set forth at length immediately after *Questions Presented* in the Petition.

Statement of Case

The case has been stated at length in the Petition, commencing directly after *Statutes Involved.*

Specifications of Errors

The Petition sets forth twenty-seven specifications of errors, all of which are submitted as substantial, but to facilitate consideration of its Petition, the petitioner invites the attention of this Court particularly to numbers 1 to 6 inclusive, 10 to 16 inclusive, and 23 to 27 inclusive, with emphasis on number 23, which presents summarily specific respects in which the court below invaded the province of the jury.

Outline of Argument

Petitioner contends that the court below made three general fundamental errors, irrespective of the errors more specifically noted by petitioner:

(1) Requiring petitioner to prove by direct evidence all matters that could not be said to have been distinctly determined in the antecedent criminal case at Lexington;

(2) Depriving petitioner of as large an advantage as possible under the estoppel doctrine, by excluding from evidence ultimate facts observed by this Court to have been found by the Lexington jury, and by holding that the Lexington Judgment established only respondents' conspiracy to fix and control retail prices of cigarettes, more particularly to maintain a three cent differential between respondents' brands and the ten cent brands;

(3) Ignoring the voluminous evidence *de novo,* introduced by petitioner, *without benefit of estoppel facts,* and invading the jury's province on all of the

evidence to conclude that there was no rational basis for the jury to find that respondents had excluded petitioner from competition.

Petitioner commenced business during the course of the conspiracy of which the respondents were convicted at Lexington. Irrespective of the absence of evidence there to show that a competitor was actually barred from the market, and thus excluded, petitioner claims that respondents' conspiracy had an impact on it, because the jobbers or distributors, as controlled instrumentalities of respondents, refused to handle petitioner's product. To prove this, petitioner urges that under the Clayton Act it was entitled to take, by virtue of the Lexington Judgment, all estoppel facts that showed control of the distributors by respondents, and their power and intent, by combination and conspiracy, to exclude potential and actual, new competitors, like petitioner. Furthermore, petitioner, if denied estoppel benefits through the Lexington Judgment, was entitled to demonstrate by circumstantial evidence *de novo* the same pattern of control and power and intent to exclude as had been established at Lexington, *which it did.*

The conspiracy pattern at Lexington was one of concerted action, by uniform acts of respondents, to maintain dealer domination and thus secure the exclusion of actual and potential competitors. *The addition to that pattern in specific terms was in the instant case the evidence of the uniform refusal of the distributors to handle petitioner's fine quality, higher priced, greater profit yielding, cigarette, for which petitioner obtained and would continue to obtain the orders, if granted.*

Accordingly, petitioner contends that on all of the evidence actually admitted before the jury, and certainly on

any estoppel facts that should have been allowed to it, there was ample basis for the jury to infer respondents' exclusion of petitioner.

I.

Petitioner did not have the burden to make a *prima facie* case by direct evidence as to all matters not distinctly determined at Lexington, or as to any other matters introduced by it.

Eastman Kodak Co. v. *Southern Photo Material Co.*, 273 U. S. 359, 375
The Eastern States case, 234 U. S., 612
Bordonaro Bros. Theatres v. *Paramount Pictures, Inc.* (Cir. 2), 176 F. 2d 594, 596
Milgram v. *Loew's, Inc.*, (Cir. 3) 192 F. 2d 579, 583
American Tobacco Co., et al. v. *United States*, 328 U. S. 783, 793, 809-810
American Tobacco Co. et al. v. *United States*, (Cir. 6) 147 F. 2d 93.

II.

The Clayton Act conferred on petitioner as a small, private litigant, without requesting it to be a witness in the prior criminal anti-trust case, the fullest benefits by estoppel under the Lexington Judgment.

Emich Motors Corp., et al. v. *General Motors Corp., et al*, 340 U. S. 558, 567-569, 571.

The court below has also heretofore held that a decree under the Clayton Act is itself *prima facie* evidence of

violation of the anti-trust laws by the defendant; *William H. Rankin* v. *The Associated Bill Posters,* (Cir. 2) 42 F. 2d 153-154, certiorari denied, 282 U. S. 864.

III.

Petitioner's *prima facie* evidence of respondents' intent to exclude competitors, did not have to be based on a finding of actual exclusion of competitors in the antecedent criminal case.

> *The American Tobacco Co. et al.* v. *United States,* 328 U. S. 783, 789-790, 791, 793, 797, 798.

In *The American Tobacco Co.* case, *supra,* (328 U. S. at pp. 811 and 812), this Court quoted with approval the following statement from the opinion of the Second Circuit Court of Appeals in *United States* v. *Aluminum Company of America,* 148 F. 2d 416:

> "It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel."

Nevertheless, in the present case the court below has ignored this valid concept of *exclusion through prevention of competition.* Notwithstanding this Court in *The American Tobacco Co.* case, *supra,* recognized that *entirely on circumstantial evidence,* the Lexington Jury found that from *1937 to 1940, the period during which petitioner entered the field, a combination or conspiracy existed* among

the respondents, with power and intent to exclude competitors to such a substantial extent as to violate the Sherman Act (328 U. S. 793). Observing that prevention of all potential competition was the natural program of respondents for maintaining a monopoly, this Court concluded that the Lexington Jury could have found from respondents' actual operation, the existence of a combination or conspiracy not only in a restraint of trade but to monopolize a part of the tobacco industry (328 U. S. 797 and 798).

Thus, in *The American Tobacco Co.* case, *supra,* this Court sustained conviction of the respondents, without proof of actual exclusion of a competitor through prevention of competition (328 U. S. 810), *but did not decide that in fact there had not been such exclusion.* The trial court's action in the present case affirmed by the court below *assumed as a fact* that respondents did not actually exclude competitors, and held that petitioner's *prima facie* evidence was deficient in not including proof that respondents excluded competitors *other than petitioner.* The imposition of such burden of proof on petitioner is specified as error (No. 10, Specifications of Errors in Petition).

IV.

The burden of proof of the entire case resting upon petitioner does not mean that the court should so far encroach upon the province of the jury as to require that one inference should be more thoroughly proven than another if both are reasonable and rational.

Bordonaro Bros. Theatres v. *Paramount Pictures, Inc., supra,* 596,

United States v. *Spagnuolo* (Cir. 2) 168 F. 2d 768, certiorari denied 335 U. S. 824,
United States v. *Sherman* (Cir. 2) 171 F. 2d 619.

In the present case, the court below ignored its own rule by affirming dismissal of petitioner's complaint, even though the evidence before the jury presented reasonable inferences for its choice, one of which was that respondents caused petitioner's exclusion from competition.

Furthermore, this rule was pronounced in a civil anti-trust case where the court below said "obviously a conspiracy such as was here charged rarely can be proved by direct evidence", *Bordonaro Bros. Theatres* v. *Paramount Pictures, supra,* 596.

V.

Invasion of the jury's province by the courts below was predicated on their misconception of the evidence to enable more than one reasonable inference to be drawn from it, and failure to admit evidence offered by petitioner.

"Where more than one inference can reasonably be drawn from the proof, it is for the jury to determine the proper one", *Bordonaro Bros. Theatres* v. *Paramount Pictures, supra,* 596.

The opinion of the court below indicates *its* conclusion that petitioner failed to secure distribution because of its own shortcomings, *but this Court has held it to be invasion of the jury's province for a court to conclude that failure of a treble-damage plaintiff's venture is due to its own shortcomings, rather than the anti-trust law violation charged*

against the defendant, because it is for the jury to make findings on that issue.

Story Parchment Co. v. *Patterson Co.*, 282 U. S. 555, 563, 566.

The reasons actuating the respondents and the distributors in denying distribution to petitioner were for the jury to determine, *Eastman Kodak Co.* v. *Southern Photo Material Co.*, (Cir. 5) 295 Fed. 98, 102; this Court's decision 375 U. S. 359, 375.

Aside from the fact that the alleged falsity of petitioner's stock prospectus was not shown to have been known to the distributors or to have influenced their actions, it was, in any event, not matter of dissent for the respondents, for no wrongful conduct of petitioner could legalize their conspiracy or immunize them against liability to those they injured, including petitioner.

Kiefer-Stewart Co. v. *Seagram & Son*, 340 U. S. 211, 214.

Testimony of Frank Riggio, as president of a small tobacco manufacturer, commencing business at the same time as petitioner, should have been admitted for purposes of comparison.

American Can Co. v. *Ladoga Canning Co.*, (Cir. 7) 44 F. 2d 763, 769-770.

Professor Tennant's testimony, including his exhibits, should not have been stricken from evidence, because he was an "expert" within the rules laid down by the cases,

Farris v. *Interstate Circuit,* 116 F. (2d) 409,
Empire Oil & Refining Co. v. *Hoyt,* 112 F. (2d) 356,
Congress & Empire Spring Co. v. *Edgar,* 99 U. S. 645,
Shipley v. *Pittsburgh & L. E. R. Co.,* 83 F. Supp. 772,
Bratt v. *Western Airlines,* 155 F. (2d) 850, cer. den. 328 U. S. 735,
Phillips Petroleum Co. v. *Payne Oil Corp.,* 146 F. (2d) 546,
United States v. *Aluminum Co. of America,* (U. S. D. C. S. D. N. Y.) 35 F. Supp. 820, 823 to 825 inclusive,
Baltimore American Insurance Co. of N. Y. v. *Pecos Mercantile Co.,* 122 F. (2d) 143,
Western Coal & Mining Co. v. *Beberich,* 94 Fed. 329,
Builders Steel Co. v. *Commissioner of Internal Revenue,* 179 F. (2d) 377.

Though petitioner maintains that, even without facts by estoppel, its evidence was sufficient for the jury, the trial court should have received in evidence the estoppel facts offered by petitioner under the Lexington Judgment before considering dismissal of the question on the merits.

VI.

The cases cited by the court below in its opinion are inapposite, and the decision of this Court in the *Emich* case does not hold that direct evidence is essential to establish impact of the conspiracy on a treble-damage plaintiff.

VII.

To require more meticulous proof than the Record discloses would amount to holding that the skillful concealment of the respondents and distributors is an invincible barrier to proof.

United States v. *Johnson,* 318, U. S. 503, 517-518.

VIII.

In considering the motion to dismiss petitioner's complaint, the court below should have recognized that the Sherman Act directs itself against the "dangerous probability" that the respondents conspired to exclude competitors, their power and intent to do so being present and every inference fairly deducible from the fact should have been made in favor of petitioner.

United States v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 226 n,

Bank of United States v. *Carneal,* 2 Pet., 543, 7 L. Ed. 513.

CONCLUSION.

By its evidence *de novo* petitioner made a *prima facie* case. As a result of their conviction at Lexington respondents were "normally, collaterally estopped to deny" (*Frost* v. *Bankers Commercial Corp.* (2 Cir.), 194 F. 2d, 505, 507; R. 4293) their conspiracy, power and intent to control distribution of tobacco products and exclude competitors. On all of the evidence, including the uniform refusal of the distributors to handle petitioner's products, the question of petitioner's exclusion by the respondents was clearly before the jury for determination, and dismissal of petitioner's complaint on the merits was erroneous invasion of the jury's province.

Because of the substantial question of general importance presented and the errors of the courts below, this Court should issue the writ prayed for by petitioner.

Respectfully submitted,

PHILIP HANDELMAN,
Counsel for Petitioner

WALTER H. SCHULMAN,
Of Counsel

OCT 17 1952

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 339

MONTICELLO TOBACCO COMPANY, INC.,

Petitioner,

v.

THE AMERICAN TOBACCO COMPANY, AMERICAN SUPPLIERS, INC., PAUL M. HAHN, VINCENT RIGGIO, LIGGETT & MYERS TOBACCO COMPANY, JAMES W. ANDREWS and WILLIAM A. BLOUNT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS THE AMERICAN TOBACCO COMPANY, AMERICAN SUPPLIERS, INC., PAUL M. HAHN AND VINCENT RIGGIO

HORACE G. HITCHCOCK,

Counsel for Respondents The American Tobacco Company, American Suppliers, Inc., Paul M. Hahn and Vincent Riggio.

RALPH D. RAY,
MELVIN D. GOODMAN,
of Counsel.

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Argument	12
I. Neither Court Below Required Petitioner to Prove Any Part of Its Case By Direct As Distinguished From Circumstantial Evidence	13
II. Petitioner Obtained From the Lexington Judgment the Maximum Advantage to Which It Was Entitled Under §5 of the Clayton Act	15
III. The Lower Courts Properly Dismissed the Action As a Matter of Law	22
Conclusion	25

Table of Authorities

Cases

Bordonaro Bros. Theatres v. Paramount Pictures, 176 F. 2d 594 (2 Cir.)	13
Brayer v. John Hancock Mut. Life Ins. Co., 179 F. 2d 925 (2 Cir.)	24
Dipson Theatres v. Buffalo Theatres, 190 F. 2d 951 (2 Cir.), cert. den. 342 U. S. 926, 72 S. Ct. 363, 96 L. Ed. 266	15

PAGE

Emich Motors Corp. v. General Motors Corp., 181 F. 2d 70 (7 Cir.) 12

cert. granted 340 U. S. 808, 71 S. Ct. 62, 95 L. Ed. 594, rehearing denied 340 U. S. 894, 71 S. Ct. 203, 95 L. Ed. 648 12

340 U. S. 558, 71 S. Ct. 408, 95 L. Ed. 534 ..... 3, 10, 12, 15-18, 20, 21

Galloway v. United States, 319 U. S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458 24

Industrial Bankers Securities Corp. v. Higgins, 104 F. 2d 177 (2 Cir.) 24

Monticello Tobacco Co., Inc. v. The American Tobacco Co., 197 F. 2d 629 (2 Cir.) 1

Moore v. Chesapeake & Ohio Railway Co., 340 U. S. 573, 71 S. Ct. 428, 95 L. Ed. 547 24

United States v. Sherman, 171 F. 2d 619 (2 Cir.), cert. den. Grimaldi v. United States, 337 U. S. 931, 69 S. Ct. 1484, 93 L. Ed. 1738 24

United States v. The American Tobacco Co., 147 F. 2d 93 (6 Cir.) 20

328 U. S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575 ..... 19, 20

OTHER AUTHORITIES

Clayton Act §5, 38 Stat. 731, 15 U. S. C. §16 ..... 12, 15-17

28 U. S. C. §347 (a) 2

28 U. S. C. §1254 (1) 2

Revised Rules of the Supreme Court of the United States, Rule 38, Par. 5 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 339

MONTICELLO TOBACCO COMPANY, INC.,

Petitioner,

v.

THE AMERICAN TOBACCO COMPANY, AMERICAN SUPPLIERS, INC., PAUL M. HAHN, VINCENT RIGGIO, LIGGETT & MYERS TOBACCO COMPANY, JAMES W. ANDREWS and WILLIAM A. BLOUNT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS THE AMERICAN TOBACCO COMPANY, AMERICAN SUPPLIERS, INC., PAUL M. HAHN AND VINCENT RIGGIO

Opinion Below

The opinion of the Court of Appeals, Second Circuit (4289-4297)* is reported in 197 F. 2d 629. No opinion was written by the District Court.

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* Unless otherwise stated, references in parentheses are to pages of the record and italics are ours.

Jurisdiction

Jurisdiction to grant certiorari herein exists under Chapter 646 of the Laws of June 25, 1948, 62 Stat. 928, 28 U. S. C. §1254 (1), rather than under the prior statute cited in the petition (28 U. S. C. §347 (a)).

Questions Presented

Petitioner has stated, as questions involved in the case, questions which are not genuinely involved at all.

Petitioner's questions I (a) and III (f) represent that the lower courts held that petitioner must establish by *direct,* as distinguished from *circumstantial,* evidence the causal connection between respondents' conspiracy, evidenced by a prior conviction, and the refusal of distributors to deal with petitioner. No such burden was imposed on petitioner. The courts below did not so hold and no such proposition was urged by respondents. These questions derive solely from a sentence in the opinion below in which "direct evidence" was used in an altogether different context.

Petitioner's question I (c) represents that the court below held that petitioner had the burden of proving, as part of its *prima facie* case, that respondents caused the actual exclusion from the market of competitors other than petitioner. No such proposition was urged by respondents below, nor made a basis for decision by either court. It is unsupported by the record.

Two main questions are presented by the record:

I. The extent to which the judgment of conviction of respondents in the prior criminal case afforded petitioner *prima facie* proof of its case.

The judgment in the prior action was received in evidence and respondents contend that the lower courts, applying the rules established by this Court in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, afforded petitioner the maximum evidentiary benefit to which it was entitled.

II. The propriety of the trial court's dismissal of the action after the petitioner had completed the presentation of its evidence upon the ground that upon the facts and the law petitioner had shown no right to relief.

Respondents contend that the dismissal was required under settled rules of this Court and the Court of Appeals because, on all of petitioner's evidence, any inference that respondents had caused distributors to refuse to deal with petitioner could not rationally be supported.

All the other questions stated by petitioner are incidental questions relating to the admissibility of evidence, which could be suitable for review only by the court below, and which are academic here because the evidence excluded could not affect the result reached by the courts below.

Statement of the Case

As the petition here states, petitioner's "claim in substance" is that respondents "caused" distributors of tobacco products "to refuse to buy, deal in or accept for distribution petitioner's at least equally good quality, non-burley, salable cigarette with the result that petitioner was prevented from competing with the respondents and was forced to suspend its operations" (Pet., p. 10). Its "Statement of Case," however, gives an erroneous and dis-

torted impression of the record as to petitioner's management, product and efforts.

According to the petition, petitioner was a company with a cigarette of "fine quality," with a president who "had long experience in the tobacco industry in various capacities," and with arrangements "with several long-experienced tobacco and cigarette salesmen" to promote its products.

The impression given is that the venture failed despite persistent efforts over two years to secure distribution of its cigarettes, which met with uniform refusal of distributors of tobacco products. The uncontroverted evidence brought out during petitioner's own case dispels any such impression.

The petitioner corporation was formed in 1938 by Richard Hartley, who became its president and principal stockholder. It issued 75,000 shares of stock, of which 58,334 were issued to Hartley for a nebulous consideration (2114, 2496-2503; Exs. K, P). The remaining shares were sold at $2.00 a share on the basis of a false and fraudulent prospectus by a broker specializing in securities exempt from registration under the Securities Act (1964, 2296, 2345-6, 2577-8, 4268, 4292). From this petitioner derived a total of $24,999, out of which Hartley took $8,300 as advances against his share of "net earnings" which were never realized (2346; Ex. 133).

With respect to Hartley, the petition avers, "There was also uncontroverted evidence of his experience with the buying and selling of leaf tobacco" (p. 29). But no tobacco company ever employed Hartley to buy tobacco (2369), and after the age of 19 (30 years before petitioner was incorporated) he had no connection with the manufacturing or growing of tobacco (2121, 2363, 2602).

At the trial Hartley testified as to experience in the leaf tobacco business during the period 1922 to 1925 at Norfolk, Virginia (2383-5). On cross-examination this testimony was shown to be false, Hartley admitting that from March 13, 1923 to May 23, 1925 he was incarcerated in the Lorton Reformatory at Lorton, Virginia, serving a sentence for grand larceny (2480-3).

The petition also refers to uncontroverted evidence of Hartley's experience with the "retail merchandising of leaf tobacco products" (p. 29). The record shows the following:

Hartley operated three retail cigar stores in Washington, D. C. which he regarded as "a continuous business" (2624). The first store he acquired on his arrival in Washington in 1909, at the age of 20 (2373). He gave it up in 1917 and took over a store at 1300 F Street which he said "had failed in business, I believe, or about to," by assuming a debt of some $3,800 (2378-80). This second store was closed on May 1, 1920 (2380, 2585). Hartley admitted that about 1919 his earnings had "just about stopped altogether" (2762). He opened a third store on G Street in 1921 (2381). On August 4, 1921, a petition for appointment of receivers was filed in connection with the foreclosure of a chattel mortgage on the stock and fixtures of the last store (Ex. Z). There were insufficient funds for the payment of creditors (Ex. X).

Hartley arrived in New York City in the early summer of 1925, and worked from time to time at various cigar stores or stands as a clerk behind the counter (2001, 2388-90). From February to June 1928, he operated a "luncheonette, candy and cigar store" through a corporation called Hartley Court, Ltd. which Hartley then put into bankruptcy (Ex. I; 2220-4, 2234-5, 2391-2).

The petition refers to Hartley's "1931 promotion of the Court cigarette, of which Faber, Coe & Gregg and other jobbers who in 1939 and later refused distribution to Monticello cigarettes, had bought substantial quantities" (p. 29). The petition avers that "Hartley withdrew the Court cigarette from the market because the formula was not what he had expected and he was not satisfied with the package" (p. 29).

The facts with respect to the Court cigarette were that in or about 1929, Hartley purchased 500,000 Court cigarettes—2500 cartons—which were manufactured for him by The American Tobacco Company (2486-7). He accounted for the sale of part of these, and others were given away (2499). In 1932 he sold all right, title and interest in this business for $125 (Ex. P; 2503).

In the interval between 1932 and 1938, when Hartley organized Monticello Tobacco Company, Inc., he engaged in no phase of the tobacco business (2517). During this period he was unable to account with any exactness as to his whereabouts (2517, 2629-34) other than that he spent the six-year period traveling around the country "making good-will" with tobacco retailers by using the unsatisfactory Court package and cigarettes "as a sort of calling card" (2515-8).

The petition alleges that "petitioner arranged with several long-experienced tobacco and cigarette salesmen to promote the sale of Monticello cigarettes and smoking mixture" (p. 31).

The books of the corporation showed a total of $82 paid for the salaries of three salesmen, none employed for more than two weeks (Ex. 124). Another, Boylston, gratuitously devoted a few hours a day in 1939 attempting

to sell Monticello cigarettes to retailers (1468-9, 1486), but never went on the payroll or received any salary (1486, 2128).

The petition, under the headings "Sales Promotion of Petitioner's Cigarette" and "Refusal of the Jobbers to Give Petitioner Distribution" (Pet., pp. 31-2), describes what are summed up as "endeavors to secure distribution of its Monticello cigarettes and smoking mixture over a period of more than two years, which met with uniform refusal by the distributors" (p. 39).

In fact, Hartley, who was the principal in this venture, made no sustained efforts to persuade distributors to handle Monticello cigarettes. He bought a small quantity of cigarettes—2,000 cartons—from a St. Louis manufacturer. According to the manufacturer, there was nothing special about these cigarettes (3008) to make them different from other general blends of flue-cured and Turkish tobaccos such as Benson and Hedges, Virginia Rounds and the original Sweet Caporals (3010, 3017).

Hartley proposed, however, that retailers sell these cigarettes at a premium of 3¢ a package over the price of popular brands. Petitioner's prospectus had stated that it was not "its purpose or intention * * * to compete with the current popular brands of cigarettes" (Ex. K). He proposed to do no advertising and he had no real sales force. His plan was to attempt to persuade distributors to promote these cigarettes by their own efforts (Ex. K).

Actually, Hartley made a few attempts in 1939 and again in 1940 to get jobbers to handle his cigarette. None of these efforts was intensive. Of the 6,000 distributors in the country, Hartley, according to his testimony, visited only 7 jobbers in 1939 and 6 in 1940 (2012-93). One of

these bought (2012); the others did not. Hartley's efforts in 1940 marked the end of his attempt to place these cigarettes with jobbers.

The petition emphasizes "orders" to jobbers which Hartley is supposed to have obtained from retailers (Pet., pp. 35-7). Although petitioner's witnesses Boylston and Hollingsworth testified that in the trade orders are customarily signed by the retailer (1489, 3532-3), Hartley's "orders" were not so signed; they were not even on regular order blanks but rather on ordinary pieces of paper on which Hartley wrote names, locations and amounts of merchandise (1995-6, 1998-9).

Unable to enlist jobbers' assistance, Hartley's next procedure should have been, as described by petitioner's witness Hollingsworth, to sell as many cigarettes as possible to retailers (3356). Hartley did visit retail outlets and place cigarettes at some of them. However, except in a few instances, after an initial order or two he refused to supply them again (2083-4, 2061). In 1940 he approached certain large chain stores, some of which purchased small quantities (2094-2104; Exs. 132, 152).

Petitioner continued to make some sales, but not in any volume, to June, 1941, when its books closed (Ex. 132).

In October, 1941, the respondents and others were convicted of violations of the anti-trust laws in a trial in the United States District Court for the Eastern District of Kentucky at Lexington, Kentucky, which is referred to as the "Lexington case." Petitioner seized upon this coincidence as an opportunity to convert its failure into a financial windfall and commenced this action in 1946, immediately after the final disposition by this Court of the Lexington case.

Petitioner states that its complaint was "predicated" on the respondents' prior conviction in the Lexington case (Pet., p. 11). But there was no allegation in the Information or issue raised in the Lexington case that the respondents had caused distributors to refuse to handle any competing products, the products of petitioner or anyone else. Nor was petitioner in any way involved or mentioned in the Lexington case.

Quite apart from its repetition of the Lexington Information allegations, therefore, petitioner complained in this case that, as the "direct result" of respondents' conduct, distributors "refused to accept" and "refused to distribute" its products (18-20, 25, 27, 30-1).

At the outset of the trial, petitioner recognized the necessity of offering independent proof connecting the petitioner with the conspiracy evidenced by the prior conviction. Its counsel stated (129):

> "Mr. Handelman: • • • We say the allegation that they violated law X is established prima facie by the judgment. Now that is not conclusive. That does not even go so far as to say it gives us a prima facie case because to have a prima facie case we must establish (1) that they violated the law which we do by this prima facie evidence; (2) *that that violation had a certain impact upon us, direct;* and, (3) that because of the impact of that violation we suffered damage. Failing in any one of those three we would have no prima facie case."

At the trial, however, petitioner offered no evidence that respondents caused jobbers to refuse to handle petitioner's cigarette.

Petitioner called representatives of only two jobbers as witnesses. One, the president of Metropolitan Tobacco Company, testified that his firm had decided not to buy

Monticello cigarettes because they "felt and decided that Monticello cigarettes would not give us sufficient volume" and did not have, in their opinion, "much chance for success"—they felt that they "couldn't make any money on the product" (1814). The other, Faber, Coe & Gregg, did order cigarettes from petitioner—it did not refuse to handle them (2012, 1675-8; Exs. E, 132).

In addition, petitioner called six retailers who had sold small quantities of Monticello cigarettes but they did not testify to any causal connection between the respondents and petitioner's failure.

At the outset of the trial, respondents contended that the judgment in the Lexington case could not be admitted as *prima facie* evidence of a conspiracy by the respondents to cause distributors to refuse to handle petitioner's products for reasons discussed *infra* in this brief under "Argument."

It was necessary for the trial judge in this case, in accordance with the direction of this Court in *Emich Motors Corp.* v. *General Motors Corp.*, to determine from the record in the Lexington case what questions were put in issue and determined. This was done. After reading all material referred to him by petitioner's counsel, the trial judge found no evidence in the Lexington case of any attempt by defendants to induce distributors not to carry any competing product.

The trial judge first ruled that as a matter of order of proof he would exclude the judgment of conviction in the Lexington case at the beginning, without prejudice to petitioner's reoffering it later. However, he finally admitted the Lexington judgment in evidence, pointing out to the jury that it did not by itself establish the petitioner's claim in this case.

Much of the ten and a half weeks' trial was taken up with a review of some of the testimony and exhibits which had been offered in the Lexington case. This proof consisted of the petitioner's calling as witnesses individual defendants who had been convicted at Lexington and having them repeat testimony given there, and of offering the record of testimony of other convicted defendants, together with copies of a large number of exhibits which had been put in evidence at the Lexington trial.

None of these exhibits concerned petitioner and the witnesses gave no testimony with respect to it or its claim that the respondents caused distributors to refuse to deal with it.

Respondents were shown to have little, if any, knowledge of petitioner. The testimony of Hahn, American's President, Riggio, former Board Chairman and President of American, Andrews, former Liggett President, and Few, present Liggett President, showed no prior knowledge at all of petitioner except that Riggio had a recollection that someone, possibly his son, had sent him a copy of petitioner's advertising circular entitled "Statement of Facts", referred to on page 24 of the petition (Ex. 2-A; 654-665).

At the close of petitioner's case, this action was dismissed, since the trial court found that on the basis of all the evidence "it would be to the last degree irrational for this jury or any jury to conclude from the evidence here that the distributors' refusal to deal with Monticello was caused by these defendants" (4284). The Court of Appeals, reviewing the entire record, has affirmed, concluding— "Absent a showing of causal connection between the collusion and jobbers' refusals to handle plaintiff's products, dismissal was mandatory" (4297).

Argument

Nothing urged by petitioner supports its conclusions that there has been a "wide departure from the established procedure" in treble-damage cases or that this case "raises important general questions of law under the antitrust statutes, and under prior decisions of this Court, which have been misconstrued or entirely ignored" (Pet., pp. 9-10, 51).

No prior decision of this Court has been misconstrued or ignored and there is no general question of federal law which requires further decision. In *Emich Motors Corp.* v. *General Motors Corp.*, 181 F. 2d 70, the Court of Appeals for the Seventh Circuit reversed judgments for plaintiffs on a number of grounds, including the effect to be given to a conviction in an antecedent action. This Court granted certiorari, but limited its review "to important questions as to the scope of §5 of the Clayton Act" (340 U. S. 558, 560; see also 340 U. S. 808, rehearing denied 340 U. S. 894). This Court then established clear rules governing the application of §5 and these rules have been punctiliously followed by the courts below. The dismissal of petitioner's action resulted not from any misinterpretation of those rules but from the deficiencies of the proof petitioner offered in support of its own individual case.

None of the other questions urged by petitioner—including those not genuinely presented by the record here—involves any federal statute. Petitioner claims conflict with decisions of this Court and of Courts of Appeals in other Circuits by a rule requiring it to prove its case by direct rather than circumstantial evidence (Pet., pp. 9-10, 49-50), but the claim falls with the demonstration that no such rule was applied and no such burden imposed on peti-

tioner. In all other respects the courts below similarly applied only established rules of law requiring petitioner to sustain its affirmative burden by competent proof.

This case presents no "special" or "important" reasons or any other grounds for review by this Court on writ of certiorari, such as stated in Rule 38 (5).

I. Neither Court Below Required Petitioner to Prove Any Part of Its Case By Direct As Distinguished From Circumstantial Evidence

Petitioner's Specifications of Errors in this Court specifies that the Court of Appeals held that petitioner, as to those matters not determined by the Lexington judgment, "had to adduce direct evidence, and could not rely on circumstantial evidence" (Pet., p. 42, par. 1). Its petition and brief labor an illusory point (e.g., Pet., pp. 2, 9, 42-43, 49-50; Br., pp. 54, 56).

The simple answer is that the Court of Appeals did not so hold and no such burden was imposed on petitioner. Concededly, a plaintiff in a conspiracy action may prove conspiracy by circumstantial evidence. This has long been elementary, as the cases cited by petitioner show (Br., p. 56). Of course, Judge Clark, who wrote the opinion of the court below, recognized the rule. He had said in an earlier treble damage action (*Bordonaro Bros. Theatres* v. *Paramount Pictures,* 176 F. 2d 594, 596-597):

> "Obviously a conspiracy such as was here charged rarely can be proved by direct evidence from the participating parties themselves; reliance must be had upon the reasonable inferences drawn from their conduct in the light of the surrounding circumstances."

There has been no departure from this settled rule and petitioner was not denied any reasonable inferences from circumstantial evidence. The basic question was whether respondents had in some way caused tobacco distributors to refuse to handle petitioner's products. Asking for the evidence which would support such an inference, the trial court said—"Now, I don't care whether it is inferential, circumstantial, pictorial, vocal, real or any other characterization of evidence. I want to see where it is. Where is the evidence that that has ever occurred, either direct evidence or inferential evidence, or circumstantial evidence?" (4245).

Petitioner's action was dismissed, not because it was limited to direct evidence but because neither presumptions from the Lexington judgment nor any other evidence offered by it—direct or circumstantial—would support a finding in its favor. In dismissing the complaint, the trial court had considered both direct and circumstantial evidence—"Clearly, there is no direct evidence of any communication by any of the defendants to any distributor * * * and the question then becomes whether or not there is evidence which would support an inference that these defendants, acting in combination, caused the tobacco distributors to refuse to deal in the products" (4284). On all the evidence, it concluded that such an inference "would be to the last degree irrational" (4284).

Petitioner tries to take advantage of Judge Clark's use of the words "direct evidence" in the opinion below (4294). Merely by this use of these words, Judge Clark certainly did not intend to overturn established law. It is abundantly clear from the context that "direct evidence," as there used by Judge Clark, referred to evidence, of whatever

character, which petitioner must offer in addition to and distinct from the Lexington judgment (4293-4):

> "*Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, has recently interpreted this [§5 of the Clayton Act] to mean that private suitors may avail themselves of the results of a criminal antitrust case only in regard to facts 'necessarily' adjudicated. Whatever the defendants would normally be collaterally estopped to deny is thus established *prima facie* by the admission of a previous criminal conviction. • • • But whatever is crucial to the treble-damage case and is not distinctly determined in the previous government suit must be proven by direct evidence. *Dipson Theatres* v. *Buffalo Theatres*, 2 Cir., 190 F. 2d 951, 958, certiorari denied 342 U. S. 926."

The *Dipson* case, cited by Judge Clark, itself involved the sufficiency of circumstantial evidence in a treble damage action.

Petitioner's counsel also used the term "direct evidence" in the same fashion at the trial to distinguish proof of the conspiracy by means of the Lexington judgment from other types of proof (134):

> "Mr. Handelman: If we should come in here and establish a conspiracy between the defendants by *direct evidence*, and we can do it, what we are then doing is waiving a special statutory privilege."

II. Petitioner Obtained From the Lexington Judgment the Maximum Advantage to Which It Was Entitled Under §5 of the Clayton Act

In ruling on the effect of the Lexington judgment, both courts have correctly applied the controlling principles laid down by this Court in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558.

Under §5 of the Clayton Act, as interpreted by this Court in the *Emich* case, a judgment in favor of the United States can be used as *prima facie* evidence only as to "matters respecting which" said judgment "would be an estoppel" between respondents and the United States (15 U. S. C. §16; 340 U. S., at p. 568). As this Court also held in the *Emich* case, it is the trial judge's task to limit to "the issues that were determined" in the prior suit "the effect of that judgment as evidence in the present action" (340 U. S., at p. 571). He must determine what was decided in the prior suit "upon an examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the courts" (*ibid.*, p. 569).

The trial judge below followed that mandate. He studied the Lexington Information, the bill of particulars, the opening statement of Government counsel, the testimony of all witnesses indicated to him by petitioner's counsel, the closing statement of Government counsel, the Court's charge, the verdict, the judgment and the opinions on appeal, and he compared them with petitioner's treble damage complaint in the light of its answers to interrogatories propounded to it (173-6). There was, of course, no reference to petitioner in this, nor any testimony of any attempt to induce distributors to refuse to deal in any competing product (154-5). At the trial petitioner's counsel conceded that the Lexington judgment was not *prima facie* evidence that respondents had conspired to cause distributors to refuse to handle competing products of other concerns (2824-5).

The trial court concluded, however, that the Lexington judgment should be admitted to show that the respondents had combined for the purpose of excluding actual or poten-

tial competitors in tobacco but not that the respondents had actually excluded anyone or had the purpose to do so by causing distributors to refuse to deal in competitors' products.

This conclusion was in complete accord with the principles established by this Court in the *Emich* case:

First: The evidentiary use of a judgment of conviction under Section 5 of the Clayton Act is determined by reference to the general doctrine of estoppel. "Such estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution"—in other words, to "issues which were essential to the verdict" and "matters of fact and law *necessarily decided* by the conviction and the verdict on which it was based" (340 U. S., at pp. 568, 569).

Second: "A general verdict of the jury or judgment of the court without special findings does not indicate which of the means charged in the indictment were found to have been used in effectuating the conspiracy" (*ibid.*, p. 569).

Third: The prior judgment is not admissible as evidence of the "impact of the conspiracy." Even under the far stronger circumstances of the *Emich* case, the treble damage plaintiffs were required to introduce, "in addition to the criminal judgment, evidence of the impact of the conspiracy on them" (*ibid.*, p. 571).

The courts below could not possibly conclude that the Lexington judgment determined that respondents combined or conspired to cause distributors to refuse to handle petitioner's—or any other—products. No such issue was ever raised, much less litigated at Lexington.

There were four counts in the Lexington Information: (1) conspiracy in restraint of trade, (2) monopolization,

(3) attempt to monopolize, and (4) conspiracy to monopolize.

Each count of the Lexington Information claimed that respondents had used several identical "methods, means and practices" to effectuate their aims. There was a general verdict, after instructions that the jury need not find all the acts charged by the Government (142). "And since all of the acts charged need not be proved for conviction, * * * such a verdict does not establish that defendants used all of the means charged or any particular one" (340 U. S., at p. 569).

The five different methods specified in each count of the Information included two which dealt solely with leaf tobacco—as distinguished from "tobacco products," e.g., cigarettes (49-52, 55-6, 59-60, 63). Of 3,013 pages of testimony for the Government, 1,631 dealt solely with the leaf tobacco phase of the Lexington case. In that part of the trial judge's charge at Lexington which related to the specific evidence in the case, 3½ of 6½ pages concerned leaf tobacco exclusively.

The general verdict at Lexington could have been based entirely on these leaf tobacco charges. Hence it would establish nothing regarding the distribution of tobacco products and nothing concerning petitioner. Petitioner never purchased or owned any leaf tobacco (86-7, 103). Petitioner expressly disclaimed "that the impact of the conspiracy hits him in his leaf purchases" (149-50).

The three remaining methods charged in the Lexington Information related to the distribution of tobacco products. One method asserted that respondents pursued "a common policy" of fixing "the factory prices of their products" and another "a common policy" of fixing "the wholesale and retail prices of their own and other tobacco manufacturers' products" (50-2).

The general verdict at Lexington could have been based entirely on these charges—likewise wholly irrelevant here. Repeatedly petitioner disclaimed that it was in any way injured by price fixing (93-4, 106-7, 111, 113-5).

The remaining method charged in the Lexington Information referred, in general terms, to a "common policy" to dominate distributors of respondents' products so as to develop and maintain "a distributive mechanism favorable to their products and unfavorable to those of existing and potential competitors" (51). There is no way of determining that the Lexington jury decided anything with respect to this phase of the case because the jury verdict, under the Court's instructions, could have been "guilty" even if it had believed none of these charges.

It is significant, moreover, that even that part of the Lexington evidence concerned with distribution of tobacco products did not relate to petitioner's claim here that in 1939 and 1940 respondents caused distributors to refuse to handle a new, premium-priced brand. The Lexington evidence on distribution of tobacco products related only to alleged price-fixing activities in 1933 intended to meet the established competition of lower-priced, 10-cent brands which distributors freely carried. This Court, in reviewing this evidence at Lexington, noted that it was "circumstantial evidence of the existence of a conspiracy and of a power and intent to exclude competition coming from cheaper-grade cigarettes" (328 U. S., at pp. 804-5)—retailing at "several cents lower than the retail price for the leading brands of" respondents (*ibid.*, p. 806). Far from being new brands which distributors were being asked to handle for the first time, the sale of these 10-cent cigarettes had already "multiplied 30 times" between 1931 and 1932, "rising from 0.28% of the total cigarette sales of the country in June, 1931, to 22.78% in November 1932" (*ibid.*). Re-

spondents endeavored to have retailers maintain a price differential of not over three cents between their brands and the 10-cent cigarettes (*ibid.*, pp. 807-8), but at no time did respondents attempt to compel distributors to refuse to deal in these brands.

There was no proof at Lexington of exclusion of competitors. The charge of the trial court at Lexington did not require proof of an actual exclusion, and this Court assumed "that an actual exclusion of competitors • • • was not claimed or established by the prosecution" (328 U. S., at p. 787).

It is thus clear that the Lexington judgment, despite petitioner's argument here, did not "establish respondents' conspiracy to exclude competitors by controlling the distributive system" (Pet., pp. 15, 55). It is similarly evident, again despite petitioner's argument here, the Lexington jury "had found" no "ultimate facts" with respect to the distribution of tobacco products (Pet., p. 18).

Nor can anything said in either opinion on appeal from the Lexington judgment create findings where none existed. "In view of the jury's verdict," the Court of Appeals' consideration was limited "to determining whether there was substantial evidence to support the verdict" (147 F. 2d 93, 101). And the opinion of this Court was "not a finding by this Court one way or the other on the many closely contested issues of fact" (328 U. S. 781, 787).

It is plain that the Lexington judgment—involving methods which could not have affected petitioner—could not be submitted to the jury "to connect" respondents "causatively with the refusal of the distributors to handle" its cigarettes as now contended by petitioner (Pet., p. 4).

In the *Emich* case the jury verdict of guilty "was firmly rooted in a finding of coercive conduct on the part

of respondents toward General Motors dealers to force the use" of its subsidiary facilities and that conclusion was "necessarily found by the jury verdict in the criminal proceeding" (340 U. S., at p. 570). As the Court of Appeals pointed out below, the jury verdict at Lexington "cannot be said to be 'firmly rooted in a finding that coercive conduct on the part of respondents' • • • made impossible the marketing of [petitioner's] non-competing higher-priced cigarettes" (4296).

But even in these circumstances, plaintiffs in the *Emich* case, before they could prove a *prima facie* case, were obliged to demonstrate by independent evidence that the real purpose in cancelling those franchises was to further the conspiracy, notwithstanding that Emich had been a witness in the Government case and had testified to cancellation of his franchise.

Cancellation of franchises had been but one of several means alleged to have been used by the defendants to effectuate their conspiracy. Under the jury's general verdict in the criminal case, the use of that particular means could not be said to have been "necessarily decided." Hence, as this Court said (340 U. S., at p. 571):

> "To establish their prima facie case it therefore was necessary for petitioners only to introduce, in addition to the criminal judgment, evidence of the impact of the conspiracy on them, such as the cancellation of their franchises and the purpose of General Motors in cancelling them, and evidence of any resulting damages."

In the light of the holding in the *Emich* case, it is clear that the Lexington judgment would not fill the gaps in petitioner's case. No jury could infer, on the basis of that judgment alone, any impact of the conspiracy on petitioner.

III. The Lower Courts Properly Dismissed the Action As a Matter of Law

Petitioner argues that the lower courts invaded the province of the jury and urges that there was sufficient evidence to go to the jury ("Questions Presented," III (d) and (e); "Specifications of Errors," Nos. 23, 25 and 27; "Outline of Argument," par. 3).

In the petition ("Questions Presented," III (a); "Specifications of Errors," Nos. 11 and 15) it is urged that the lower courts made "assumptions of fact and created a presumption of innocence in favor of the defendants and distributors of cigarettes". Petitioner gives no record references to sustain this proposition, nor does it clarify its meaning. If by it petitioner means to state that the lower courts applied anything different from the usual rule that petitioner had the burden of proving a *prima facie* case, there is simply nothing in the record to support it.

It is misleading to suggest, as the petition does ("Questions Presented," I (c); "Specifications of Errors," No. 10), that petitioner had the burden to prove exclusion of others as part of its case. No such burden was ever placed on petitioner, and no such rule is even mentioned in the opinion below. In petitioner's only discussion of this point, at page 41 of the petition, record references are cited referring to colloquy between the trial court and petitioner's counsel. These merely refer to questions by the trial court as to whether there was any proof of exclusion of competitors. But these questions certainly point to no ruling that proof of exclusion of others was required.

Petitioner was afforded every opportunity and unlimited time to supply any competent evidence to connect respondents with the refusal of distributors to deal in its products.

Time and again, during the argument of the motions to dismiss, the trial court asked petitioner's counsel to point to any evide.. from which a jury could infer that respondents had in some way caused distributors to refuse to handle petitioner's products (4243-4, 4252, 4257, 4271-2). Petitioner pointed to no such evidence then and its brief points to none now.

Clearly, petitioner had not supplied that proof by testimony of the only two jobbers it called. One had not refused petitioner (1675-8). The other had refused because it felt petitioner's cigarettes "would not give us sufficient volume" and did not have "much chance for success" (1814).

That proof could not come from the Lexington judgment or from the second use of testimony or exhibits from the Lexington record. Even if repetition of Lexington testimony and exhibits would show "by circumstantial evidence *de novo* the same pattern of control and power and intent to exclude as had been established at Lexington" (Pet. Br., p. 55), it did not show that respondents ever caused distributors not to handle petitioner's or any other products.

There could be no inference of any causal connection from petitioner's proof of the naked fact that over a two-year period about 12 jobbers out of 6,000 distributors had refused to deal with it. Moreover, there was nothing in the experience of others from which any refusal to deal policy could be inferred. Petitioner's own evidence showed that distributors handled a variety of small brands (2832-3, 3350-2, 3489, 3544-6), including brands without burley tobacco, the supposed distinction claimed for petitioner's cigarette (3010, 3017). Petitioner further conceded that there was no evidence that the failure of any other brand

was caused by a uniform and compelled refusal on the part of distributors to handle the product (4251), or that any other company was prevented from having the benefit of distributive services (4253).

Dismissal of the action under these circumstances did not constitute an invasion of the province of the jury. The trial court was expressly applying the rule in *United States* v. *Sherman,* 171 F. 2d 619, certiorari denied *Grimaldi* v. *United States,* 337 U. S. 931. "The question, whether a judge shall submit the evidence to a jury for a verdict," in any case, civil or criminal, is "whether the evidence will rationally support a finding in favor of the party having the affirmative" (*ibid.,* p. 621).

On this record the Court of Appeals agreed that "dismissal was mandatory. *United States* v. *Sherman,* 2 Cir., 171 F. 2d 619, certiorari denied *Grimaldi* v. *United States,* 337 U. S. 931; *Brayer* v. *John Hancock Mut. Life Ins. Co.,* 2 Cir., 179 F. 2d 925; *Industrial Bankers Securities Corp.* v. *Higgins,* 2 Cir., 104 F. 2d 177" (4297).

There was nothing at all to support an inference of respondents' complicity in the distributors' refusals to deal. Any such inference "would be speculation run riot. Speculation cannot supply the place of proof" (*Moore* v. *Chesapeake & Ohio Railway Co.,* 340 U. S. 573, 578). As this Court said in *Galloway* v. *United States,* 319 U. S. 372, 395:

> "Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."

Conclusion

No reason exists why this Court should review this case. The petition is singularly without merit and should be denied.

Dated: New York, N. Y.
October 14, 1952

Respectfully submitted,

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No. 339

FILED
OCT 17 1952
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

MONTICELLO TOBACCO COMPANY, INC.,
Petitioner,

v.

THE AMERICAN TOBACCO COMPANY, AMERICAN SUPPLIERS, INC., PAUL M. HAHN, VINCENT RIGGIO, LIGGETT & MYERS TOBACCO COMPANY, JAMES W. ANDREWS and WILLIAM A. BLOUNT,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR LIGGETT & MYERS TOBACCO COMPANY, JAMES W. ANDREWS, AND WILLIAM A. BLOUNT IN OPPOSITION

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INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	1
STATUTES INVOLVED	2
STATEMENT	2
Petitioner and its alleged cause of action	2
Genesis of complaint	4
Comparison of complaint and Lexington information	5
Pre-trial proceedings	6
Rulings on Lexington judgment	7
ARGUMENT	
I. The limited effect given the Lexington judgment was proper	8
II. The Court of Appeals decision is not in conflict with or a departure from other decisions of this Court or of the Courts of Appeal	12
III. The striking or excluding of testimony relating to speculative damages is academic	14
IV. Dismissal was mandatory in absence of rational basis to support claim of exclusion	15
CONCLUSION	19

CASES CITED

American Tobacco Co. et al. *v.* United States, 147 F. 2d 93 (C. C. A. 6th 1944), aff'd 328 U. S. 781 (1946), referred to as the Lexington Case 4, 9, 10, 12

PAGE

Dipson Theatres, Inc. *v.* Buffalo Theatres, Inc., 190 F. 2d 951 (C. A. 2d 1951), cert. den. 342 U. S. 926 (1952) ---------- 11, 13

Emich Motors Corp. et al. *v.* General Motors Corp. et al., 340 U. S. 558, id. 945 (1951) ---------- 2, 8, 11

Galloway *v.* United States, 319 U. S. 372 (1943) ---- 14, 19

Milgram et al. *v.* Loew's Inc. et al., 192 F. 2d 579 (C. A. 3d 1951), cert. den. 343 U. S. 929 (1952) ---------- 11

Moore, Adm. *v.* Chesapeake & Ohio Railway Co., 340 U. S. 573 (1951) ---------- 14

Myers *v.* Reading Company, 331 U. S. 477 (1947) ---- 19

United States *v.* Sherman et al., 171 F. 2d 619 (C. A. 2d 1948) ---------- 19

STATUTES CITED

15 U. S. C. § 1, 2, 26 Stat. 209 (1890), as amended 50 Stat. 693 (1937) ---------- 2

§ 15, ch. 323, § 4 38 Stat. 731 (1914) ---------- 2

§ 16, ch. 323, § 5 38 Stat. 731 (1914), sometimes referred to as § 5 of the Clayton Act ---------- 2, 4

28 U. S. C. § 1254(1), 62 Stat. 928 (1948) ---------- 1

Rules of Civil Procedure for the United States District Courts, 28 U. S. C. (1946) following § 723(b), as amended:

Rule 41(b), F. R. C. P. ---------- 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

MONTICELLO TOBACCO COMPANY, INC., *Petitioner,* *vs.* THE AMERICAN TOBACCO COMPANY, AMERICAN SUPPLIERS, INC., PAUL M. HAHN, VINCENT RIGGIO, LIGGETT & MYERS TOBACCO COMPANY, JAMES W. ANDREWS and WILLIAM A. BLOUNT, *Respondents*	No. 339

BRIEF FOR LIGGETT & MYERS TOBACCO COMPANY, JAMES W. ANDREWS, AND WILLIAM A. BLOUNT IN OPPOSITION

OPINION BELOW

The unanimous opinion of the Court of Appeals, Second Circuit, affirming dismissal of the complaint is reported at 197 F. 2d 629. The District Court wrote no opinion.

JURISDICTION

Petitioner invokes Section 347 (a) of former Title 28. This section was superseded in the Revised Judicial Code of 1948, 62 Stat. 928, 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Petitioner urges that this Court review a unanimous affirmance by the court below of a judgment dismissing

the complaint on the merits at the close of petitioner's case for lack of any rational basis to support it.

Stripped of confused verbosity, the petition urges the following questions:

1. Whether, under Section 5 of the Clayton Act, 15 U. S. C. § 16, and the decision of this Court in *Emich Motors Corp. et al.* v. *General Motors Corp. et al.*, 340 U. S. 558, id., 945, petitioner was entitled to admission of a prior judgment, convicting respondents and others of Sherman Act violations, as *prima facie* evidence of facts not adjudicated in the prior case.

2. Whether the Court of Appeals denied petitioner recourse to circumstantial evidence to prove essential elements of its case which could not be established *prima facie* by estoppel.

3. Whether petitioner was prejudiced by the exclusion by the trial judge of certain evidence pertaining to damages.

4. Whether the quantum of evidence presented warranted submission of the case to the jury.

STATUTES INVOLVED

The pertinent provisions of the antitrust laws are set forth on pages 5-8 of the Petition.

STATEMENT

Petitioner and Its Alleged Cause of Action

Alleging it was injured in its business—the manufacture and distribution of tobacco products—by reason of respondents' violation of Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1, 2), petitioner, hereinafter referred to as Monticello, sued for treble damages of $36,000,000 pursuant to Section 4 of the Clayton Act (15 U. S. C. § 15).

Its claim was that pursuant to conspiracy respondent tobacco companies, Liggett, American and American Suppliers, kept it from obtaining orders from tobacco distributors for its products.

The court below, in an opinion by Judge Clark, described Monticello as follows (4292-3)†:

> "Monticello Tobacco Company's moving spirit was one Richard Hartley. Its unhappy history began in 1938 with the issuance of a stock prospectus claiming that Hartley had had substantial experience in the tobacco field. The claims were false. Hartley had made an abortive attempt to market a 'Court' cigarette, manufactured for him by American Tobacco Company, during the early thirties; but otherwise there was nothing in his past as to either general business success or initiation into cigarette marketing. Nonetheless, some 16,666 shares of Monticello stock were marketed, resulting in a capital investment of $24,999.
>
> "With this, Hartley paid himself $8,300 in advances against his share of net earnings. He also purchased Monticello's inventory of 2,000 cartons of cigarettes and a small amount of pipe tobacco made to order for the company by Christian Peper Tobacco Company. This comprised Monticello's entire stock in trade during its active career; it never manufactured its own cigarettes. It was proposed to market the Monticello cigarette, without substantial advertising, by granting to buyers 5 per cent more discount than established brands offered and, in turn, to suggest an accordingly higher retail price. Hartley, however, was practically his own sales force and his plan met with little success. In the year 1939 he visited some five cigarette jobbers in New York; one placed an order. He also called

† Record references are to page numbers; petitioner's exhibits are referred to as PX, respondents' as DX, interrogatories propounded by Liggett before trial as Int., the petition as Pet. and petitioner's brief as Br.

on several retail stores, some of whom agreed to stock Monticellos; but, as Hartley testified, he did not pursue this outlet, preferring to market through distributors. In 1940 he visited seven jobbers in the Philadelphia-Washington area, but was unable to stimulate any interest, though again some retail concerns agreed to buy. Finally, late in 1940, Hartley sold a few cartons to chain stores in New York as a final gesture. The books of the corporation were closed in June, 1941. By that time, 706 of the 2,000 cartons purchased were unsold. Some scant sales of $511.83 had been recorded, it is true. But we cannot conclude from the record of the corporation that any sustained management effort was made to market Monticellos on a continuing or permanent basis."

Genesis of Complaint

The complaint originated in an anti-trust information filed by the United States at Lexington, Kentucky, on July 24, 1940 under which respondents and others were convicted by a general verdict. The judgment of conviction was affirmed by the Circuit Court of Appeals, Sixth Circuit (*American Tobacco Co. et al.* v. *United States,* 147 F. 2d 93), and by this Court on limited review, 328 U. S. 781. That case is referred to as the Lexington case.

Monticello annexed the Lexington information and judgment to the complaint (34-71) and asserts the right—as it has from the outset—to have the prior judgment operate by estoppel as *prima facie* evidence of the antitrust violations it alleges in this case.

Since Section 5 of the Clayton Act provides that a prior judgment shall be *prima facie* evidence only as to "all matters respecting which said judgment • • • would be an estoppel as between the parties thereto," analysis and comparison of the Lexington information and the complaint here are required.

Comparison of Complaint with Lexington Information

As at Lexington, respondents are charged with conspiracy in restraint of trade in tobacco under Section 1 of the Sherman Act, monopoly of such trade, and conspiracy to monopolize in violation of Section 2.

The factual specifications are similar to those in the information (pars. 20a to e; R. 14-8; Inf. par. 26a to e; R. 49-52), and fall into three categories:

1. Control by respondents of the purchase of leaf tobacco on auction markets to the injury of growers and other buyers, particularly by price-fixing (pars. 20a and b; R. 15; Inf. par. 26a and b; R. 49-50). *The leaf phase of Monticello's case was abandoned by answers to interrogatories propounded by Liggett before trial* (Int. D.3(b); R. 93, 106, 113-4). *It offered no evidence of leaf buying activities at the trial; and counsel conceded that the leaf phase of the Lexington case did not affect Monticello* (4243).

2. Restraining and eliminating price competition by fixing factory prices for their own products (par. 20c; R. 15; Inf. par. 26c; R. 50). *Plaintiff's counsel also disclaimed that identity of factory prices affected Monticello's attempt to sell its products* (Int. F. 2; R. 95, 107, 115).

3. Domination of distributors of tobacco products to secure a distributive mechanism favorable to respondents' products by *price-fixing* in the wholesale and retail markets (par. 20d and e; R. 16-18; Inf. par. 26d and e; R. 51-2).

As to distribution, Monticello's claim is based on the following allegations, none of which is found in the information: (*1*) that distributors to whom respondents sold direct were "favored" and "completely or substantially under the domination and control" of respondents, so that respondents were in a position to dictate whether they might deal in brands of others, including Monticello (cf. par. 17; R. 12; Inf. par. 23; R. 47), and (*2*) that the granting and withholding of favors to distributors depended on their compliance with respondents' instructions, thereby facilitating exclusion of others, including Monticello (cf. par. 20d and e; R. 16-17; Inf. pars. 26d and e; R. 51-2). Plaintiff claims that these asserted activities had the object and effect of excluding it from the market and driving it out of business (pars. 21, 30, 38; R. 18, 26, 31).

Thus the complaint differs in vital respects from the information. Monticello abandoned the leaf and factory price phases of its case, leaving only the claim that it was excluded from distribution channels—a claim wholly absent at Lexington (4246, 4256).

As we suggest here and demonstrate in the Argument, petitioner did not and could not suffer any injury by reason of any matter tried in the Lexington case, and there can be no estoppel.

Pre-Trial Proceedings

Answers to interrogatories addressed to Monticello in preparation for trial show that it relied on the conviction at Lexington, plus the refusal of 25 of the 6000 jobbers to buy Monticellos, to prove the conspiracy and to establish the causal connection between the conspiracy and the alleged injury (Int. D. 1, R. 91, 105-6, 110, 113-4; G. 4, R. 95, 107). It conceded that there was no independent evidence of Sherman Act violation (115, fol. 344).

Rulings on the Lexington Judgment

Ruling at the Outset

In the exercise of his discretion to control the order of proof, the trial judge refused to permit petitioner to refer to the Lexington judgment in the opening statement, or to offer it in the presence of the jury, reserving the right to admit it as the trial progressed (R. 176-7).

Admission for Limited Purpose

In the third week of trial counsel was permitted to question respondents Andrews, Riggio, and Hahn concerning their conviction in the Lexington case (877 *et seq.*, 898, 917, 1121-2); the Court instructed the jury that answers bore on credibility (899-901, 918)—the only basis for which the testimony was offered (887, fol. 2661).

Near the end of the trial the Court allowed the Lexington judgment in evidence for a limited purpose, instructing the jury (3292-6) that it might be considered as "evidence of what the defendants had done in other spheres of their business"; that it was "evidence only that the defendants combined for the purpose of excluding actual or potential competitors . . . other than Monticello . . . by means of price-fixing and not by causing distributors to refuse to deal . . . with Monticello or with anyone else . . ."; that "it does not establish that the defendants actually excluded anyone, even by . . . price-fixing" (a fact admitted by counsel for petitioner, 160, 4246, 4256).

• • • • •

At the close of petitioner's case the trial court granted respondents' motion to dismiss the complaint for lack of any rational basis to support the claim that the refusal of distributors to deal with Monticello was caused by respondents (4284).

warehousemen, and leaf dealers as traders who might have been the objects thereof; (*2*) identity of the list prices of respondents' popular brands and changes therein, which could have affected only the respondents; and (*3*) distribution of cigarettes by manipulating *retail* prices (not distribution by wholesale concerns) so as to prejudice the manufacturers of ten-cent cigarettes.

Monticello could not have been injured as a result of any transactions by respondents in the leaf marketing or price identity phases of the Lexington case; it abandoned them. This left only the distribution phase of the Lexington case as one which could possibly have affected Monticello.

The distribution aspects of Lexington and this case are completely different. Even as amplified by the bill of particulars, the Lexington information alleged only that distributors were under real or assumed obligations to respondents, through which the latter could have exercised dominion over the *price* policies of distributors, not over their freedom to buy or refuse to buy any particular brand (Lex. Rec., p. 132-3). There is not an iota of evidence in the entire record, either here or at Lexington, that respondents attempted to devise or apply any method or machinery for censoring the shelves of wholesalers.

Further, the means alleged and particularized at Lexington show that the domination bore only on prices of *retail* dealers; the evidence touched on in the Supreme Court opinion (328 U. S., p. 807-8) concerned only *retail* pricing (PX 32 Id., 56 Id., 57 Id.). By contrast, Monticello's claim relates to the exclusion of its product by a handful of wholesalers allegedly under respondents' control, a wholly different matter not even referred to at

Lexington. Counsel conceded that Monticello was not affected by retail prices (4243).

The *Emich* case involved only *one* trade—General Motors automobiles; *one* class of traders—G. M. dealers—whose trade was restrained; *one* object—monopolization of the financing of G. M. cars; and *one* method of effectuation—coercion of G. M. dealers. There were a number of specifications in the indictment and some evidence relating thereto, but all added up to coercion by G. M. of its dealers to use GMAC financing. It was this *one* issue as to which estoppel resulted.

By contrast the Lexington judgment not only is *not* an estoppel; it is predicated on charges separate and distinct from Monticello's claims. Unlike the situation in the *Emich* case, two different conspiracies—two different courses of conduct—were present in the two cases.

The trial judge did admit the Lexington judgment "for the limited purpose of showing respondents had conspired to exclude competition by price-fixing, but not that this conspiracy had caused plaintiff's collapse." (4291) This afforded petitioner the maximum benefit to which it was entitled. Cf. *Milgram et al.* v. *Loew's Inc. et al.*, 192 F. 2d 579 (C. A. 3d 1951), cert. den. 343 U. S. 929 (1952); Fn 8 to *Emich* decision, 340 U. S. 558, 571. Even with this benefit petitioner failed to prove the conspiracy charged or any impact of past price-fixing collusion upon it. In the circumstances the prior judgment was not a substitute for independent proof. *Dipson Theatres, Inc.* v. *Buffalo Theatres, Inc.*, 190 F. 2d 951 (C. A. 2d 1951), cert. den. 342 U. S. 926 (1952).

Petitioner urges it is entitled to the benefit of certain "ultimate" facts "found" by this Court in the Lexington

case. This Court made no such findings; it prefaced its discussion of the Lexington case with the remark that "The present opinion is not a finding by this Court one way or the other on the many closely contested issues of fact" (328 U. S. p. 787). Remarking (p. 790-1) that it was difficult, in view of the "many variations in the business activities" of the defendants, to state which "did each of the acts mentioned", so that mention of defendants meant "some or all" of them, it referred to some of the evidence, and concluded: "It was on the basis of such evidence that the Circuit Court of Appeals found that the verdicts of the jury were sustained by sufficient evidence on each count" (328 U. S. p. 808). Contrary to petitioner's contention (Pet. 18-9), there were no "findings" by this Court or by the Circuit Court of Appeals, Sixth Circuit.

While both appellate courts indicated that, taking the view of the evidence most favorable to the Government, there was support for all three aspects of the Lexington case, the fact remains that *any one alone sufficed to support the verdict.* Hence there can be no estoppel as to any of them any more than there is an estoppel as to means and acts.

II

The Court of Appeals Decision Is Not in Conflict With or a Departure From Other Decisions of this Court or of the Courts of Appeal.

Petitioner urges that the decision of the Court of Appeals requires a treble damage plaintiff to establish its case without recourse to circumstantial evidence (Pet., pp. 2, 9, 49; Br. 54-6). It infers this from a statement of the court (4294) that:

> ". . . whatever is crucial to the treble-damage case and is not distinctly determined in the previous government suit must be proven by direct evidence . . ."

The claim that the court below denied petitioner the benefit of circumstantial evidence is a distortion resulting from reading a single sentence of the opinion out of context. The key to the court's meaning, as indeed to its very decision, is its statement in a prior paragraph (4293):

> ". . . the mere fact of conviction cannot make the major tobacco manufacturers liable for every business casualty in the cigarette field."

and its holding (4297):

> ". . . Absent a showing of causal connection between the collusion and the jobbers' refusal to handle plaintiff's product, dismissal was mandatory. . . ."

Clearly the court did not use the technical legal phrase "direct evidence" as distinguished from "circumstantial evidence". It rather employed the adjective "direct" as meaning "bearing straight upon the object" (Webster's New International Dictionary, Second Ed.), the object being the connection between past collusion and petitioner's failure. It had stated the basis upon which *prima facie* evidence is available by estoppel, and was merely distinguishing that type of ready-made proof from the "showing" required when estoppel is not available.

Neither directly nor by implication did the court preclude circumstantial evidence as proof in treble damage cases. Obvious as this is, any possible doubt is resolved (*1*) by the court's citation of the *Dipson* case (190 F. 2d 651) immediately following the sentence complained of—a case where plaintiff relied on circumstantial evidence in the absence of estoppel, and, (*2*) by its citation of cases (4297) requiring dismissal where there is no rational basis to support an inference in favor of a plaintiff's case. Judges A. N. Hand and Clark participated in the decisions in the *Dipson* and *Monticello* cases.

Laying semantics aside, the fact is that Monticello, after eleven weeks of trial, could show no impact of the Lexington price-fixing conspiracy on it, nor—independently—any conspiracy to exclude it. It relied on estoppel and, so doing, necessarily failed for reasons stated above in Point I.

The trial court granted the motion to dismiss at the close of petitioner's case after lengthy argument (4178-4283). Petitioner conceded that it had no independent proof of anti-trust violations on the part of respondents outside the Lexington judgment (115, fol. 344) and that there was no proof of exclusion of a competitor at Lexington (4246) even by price-fixing (4256). The court below properly required "a showing" of impact, which petitioner was unable to furnish. In accordance with decisions of this Court, it refused to allow speculation as a substitute for probative facts. *Moore, Adm.* v. *Chesapeake & Ohio Railway Co.*, 340 U. S. 573 (1951); *Galloway* v. *United States*, 319 U. S. 372, 395 (1943).

The point urged by petitioner has no merit and could have no possible bearing on the outcome of its case.

III

The Striking or Excluding of Testimony Relating to Speculative Damages is Academic.

Testimony of Tennant on speculative damages was stricken; that of Riggio for the same purpose, excluded. We refrain from discussing the rulings of the trial court in these respects because they are academic. Petitioner failed to establish its case; the question of damage is therefore moot.

IV

Dismissal Was Mandatory in Absence of Rational Basis to Support Claim of Exclusion.

At the close of plaintiff's case, in the eleventh week of trial, defendants' motion to dismiss under Rule 41(b) was granted after lengthy argument (4178-4283), the court stating (4284):

> "Clearly, there is no direct evidence of any communication by any of the defendants to any distributor, either those alleged to have been visited by Hartley or anybody else, and the question then becomes whether or not there is evidence which would support an inference that these defendants, acting in combination, caused the tobacco distributors to refuse to deal in the products.
>
> "I have carefully reviewed my own notes, I have carefully reviewed the testimony, and I have considered all of the points called to my attention yesterday by the plaintiff's counsel, and I conclude that it would be to the last degree irrational for this jury or any jury to conclude from the evidence here that the distributors' refusal to deal with Monticello was caused by these defendants."

Petitioner urges that evidence adduced without benefit of estoppel sufficed to create an inference that respondents caused distributors to refuse to deal with Monticello, and that the issue of exclusion should have been submitted to the jury.

A resume of the facts contained in the opinion of the Court of Appeals is set forth above at page 3. Additional facts had a bearing upon the result.

Other than itinerant service as a retail tobacco salesman, Hartley had engaged in four personal enterprises since 1917. All were failures. A retail tobacco store he opened in 1917 had no earnings after 1919 (2625, 2762). He then opened a similar enterprise which wound up in receivership within a year, leaving unsecured creditors unpaid (2381, 2477, DX X, Z). Hartley then claimed to have reentered the leaf business, in which he had been engaged as a youth, but admitted that he spent over two years of this period in a Federal penitentiary for grand larceny (2480-2). In 1925 he opened a "luncheonette, candy and cigar store" in New York which ended in bankruptcy in about four months (2390-2 et seq., 2484, DX I, O).

He organized Court Tobacco Company in 1930 with a stock of 500,000 cigarettes (2485-7) which he described as inferior in appearance and quality (2494, 2500, 2632), but which he nevertheless gave away in the period 1932-8 (a period otherwise unexplained except that he had no income from the tobacco business) to build goodwill for the forthcoming Monticello (2516-8, 2634). In the fraudulent stock-selling prospectus which launched Monticello he claimed sales of 13,500,000 Courts—13,000,000 more than his supply.

The Monticello cigarette was represented in the prospectus to be the product of "much time and effort spent by some of the best experts in the tobacco industry" (DX K, p. 2), although Hartley claimed personal authorship on the stand (1969, 1979).

The illusion of originality was dispelled by the testimony of the manufacturer, Christian Peper, who supplied one lot on a "spot cash" basis (PX 114, 3008). Peper

testified that Hartley's "formula" was unworkable and meaningless (3014-9), that Hartley showed no special knowledge of blending (3009, 3016), and that Monticellos, a premium priced brand, were no different from "the ordinary run of blended cigarettes" (3010, 3017) which had consumer acceptance (3017) at popular prices.

Hartley's promotional and sales efforts were ill-conceived and poorly executed. No distributor approached by Monticello gave any reason for refusal to deal in its product which implied wrong-doing on the part of respondents (Int. G16; R. 98-9, 107).

Hartley stated he "didn't have any program for any advertising at all" (2244). Monticello's promotional effort was limited to some sampling of consumers, advertising inserts (PX 2A), and visits to a very small number of retailers and distributors.

As stated in the prospectus, it was "not the purpose or intention of the Company to compete with the current popular brands" (DX K, p. 4). Hartley did not intend to push sales vigorously himself but only to "spend a few days in each city helping the jobbers in obtaining the initial orders from the retailers, after which the jobbers will promote the sales through their own sales force" (DX K, p. 3). The proof bears out this representation of half-hearted salesmanship. Monticello had but three paid salesmen who worked from four days to three weeks. Its total sales payroll was $82.

Of 6,000 distributors in the United States, Monticello attempted to market through 13 of them; it chose to call to the stand only *one* jobber and its subsidiary, *one* chain, and Faber, Coe & Gregg. None of them supported Monti-

cello's claim of exclusion. Metropolitan thought Monticello showed no prospects of volume sufficient to indicate profitable business (1814). Faber, Coe & Gregg, not a jobber of cigarettes, purchased Monticellos until two months prior to Monticello's last sale (2242, PX 131, DX E), and ordered them as late as December 1941 (PX 102) when Monticello was dormant. It filled all bona fide orders (1676, 1735-6). United Cigar-Whelan was not examined concerning petitioner's efforts to market its products (1955-63), and Metropolitan's subsidiary did not even bother to forward orders to its parent (1446-7).

Ten distributors listed among a total of 25 jobbers and chains who refused to deal in Monticellos had local addresses (Int. G4; R. 95, 107), but none was called. Of the 6 firms which did purchase Monticellos (Int. G5; R. 96, 107), only Faber was called. None of nine out-of-state jobbers whose depositions were taken by respondents was produced.

The record discloses that three isolated efforts to obtain wholesale distribution were made by Hartley:

1. Beginning April 24, 1939 Hartley went to see Faber and Metropolitan (1989, 2038). Also called on were several other local jobbers, Packer, Green, Rabinowitz, and T. Miller, all approached at about the same time (2091-3), none of whom Hartley asked to fill orders (2093). This effort lasted until after an Albany trip in the fall of 1939 (2052).

2. Almost a year later Hartley made a trip of about ten days' duration to see six jobbers in Philadelphia, Baltimore (2084-91), Norfolk, Washington (2070-82), and Richmond (2065-71).

3. The final effort was confined to the period July 12 to 26, 1940, when Hartley approached certain

chains: Schulte (2101-3), Union News (2103-5), United Cigar-Whelan (2093-8), and Liggett Drug, where there was a single request for Monticellos in one store (2098-2100).

These facts, all of which are uncontradicted, left no rational basis upon which the jury could have inferred that respondents, by conspiracy, caused distributors to refuse to deal with Monticello. The trial judge properly granted the motion to dismiss under Rule 41(b) of the Federal Rules of Civil Procedure. *United States* v. *Sherman et al.*, 171 F. 2d 619 (C. A. 2d 1948); *Myers* v. *Reading Company*, 331 U. S. 477 (1947); *Galloway* v. *United States*, cit. *supra*.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Dated: October 16, 1952

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 339

MONTICELLO TOBACCO COMPANY, INC.,
Petitioner,

v.

THE AMERICAN TOBACCO COMPANY, AMERICAN SUPPLIERS, INC., PAUL M. HAHN, VINCENT RIGGIO, LIGGETT & MYERS TOBACCO COMPANY, JAMES W. ANDREWS and WILLIAM A. BLOUNT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

PHILIP HANDELMAN,
Counsel for Petitioner.

WALTER H. SCHULMAN,
of Counsel.

INDEX

PAGE

ARGUMENT 1

I. RESPONDENTS' STRAINED INTERPRETATION OF THE TERM "DIRECT EVIDENCE" IS NOT SUSTAINED BY THE RECORD, WHICH CLEARLY SHOWS DISMISSAL OF THE COMPLAINT FOR LACK OF DIRECT EVIDENCE OF RESPONDENTS' CAUSATION OF EXCLUSION OF PETITIONER FROM COMPETITION 3

II. RESPONDENTS' BRIEFS CONFIRM THE AVERMENTS OF THE PETITION TO THE EFFECT THAT PETITIONER'S EVIDENCE DE NOVO, COUPLED WITH ADMISSION OF THE LEXINGTON JUDGMENT FOR LIMITED EFFECT, PRESENTED TO THE JURY REASONABLE ALTERNATIVE INFERENCES, WHICH WERE REMOVED FROM ITS DETERMINATION BY DISMISSAL OF THE COMPLAINT 5

III. THE TRIAL COURT DENIED PETITIONER THE ULTIMATE FACTS ESTABLISHED BY THE LEXINGTON JUDGMENT, WHICH WERE PRIMA FACIE EVIDENCE OF RESPONDENTS' CONTROL OF DISTRIBUTORS 9

IV. RESPONDENTS' FACTUAL APPROACH LEAVES NO DOUBT THAT IN ADDITION TO THE OTHER GENERAL QUESTIONS OF LAW PRESENTED, THERE IS THE IMPORTANT QUESTION OF DISMISSAL OF THE COMPLAINT AS A RESULT OF ERRONEOUS INVASION OF THE JURY'S PROVINCE 9

CONCLUSION 10

CASES CITED

	PAGE
Eastman Kodak Co. v. *Southern Photo Material Co.*, 273 U. S. 359, 375	2, 4
Story Parchment Co. v. *Patterson Co.*, 282 U. S. 555, 563, 566	8
United States v. *Manton* (Cir. 2) 107 F. 2d 834	4

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Argument

I. By tortuous speculation on the meaning of "direct evidence" in the opinion of the Court of Appeals (R. 4294), respondents urge that the general question of law concerning proof of an exclusion claim in a treble damage case by direct rather than by circumstantial evidence, does not exist. Petitioner shows from the record, *infra,* that this question, as to which it seeks certiorari, is definitely pres-

ent, and the action of both courts below is contrary to this Court's rule in the case of *Eastman Kodak Co.* v. *Southern Photo Material Co.*, 273 U. S. 359, 375 (Petition, pp. 9-10; Brief in Support of Petition, pp. 56 and 60). Respondents completely ignore that case, making no reference to it whatever in their briefs; and it is not mentioned in the opinion of the Court below.

II. Respondents have not refuted the existence of the evidence summarily presented by petitioner (Petition, pp. 19-40) to demonstrate the *sufficiency of the evidence* for the jury, in conjunction with the facts of respondents' conviction of conspiracy to restrain trade, monopolization, and conspiracy to monopolize, which the trial court admitted in evidence as *prima facie* evidence from the Lexington Judgment. Respondents' factual arguments merely *emphasize the existence of fact issues for determination by the jury,* whose province was invaded by the courts below, with consequent erroneous dismissal of petitioner's complaint as a matter of law—elaborated *infra.*

III. Respondents' argument in substance that the Lexington Judgment was available to petitioner only to establish the bare fact of their conviction of violation of the anti-trust laws, ignores the plain *observations* (*not* findings) of this Court that *the Lexington jury found* that respondents had the power and intent to exclude *undesired* competitors, and conspired to monopolize the cigarette market, *and* to fix and control prices "and *other material conditions** relating to the distribution and sale * * * of cigarettes" (Petition, p. 18), with the purpose "to maintain that monopoly if need or occasion shall offer itself to

*Petitioner's emphasis.

attempt such an exclusion" of competitors (Petition, p. 19). Petitioner briefly reiterates *infra* its position on the Lexington Judgment as an *aid in its proof of respondents' control of distributors,* and not as an estoppel fact of "actual exclusion", which was for the jury to infer in the present case with respect to petitioner.

IV. The total effect of respondents' briefs is to corroborate petitioner's position that the substantial, important general questions of law presented in the Petition, exist and merit the consideration of this Court.

I.

RESPONDENTS' STRAINED INTERPRETATION OF THE TERM "DIRECT EVIDENCE" IS NOT SUSTAINED BY THE RECORD, WHICH CLEARLY SHOWS DISMISSAL OF THE COMPLAINT FOR LACK OF *DIRECT EVIDENCE* OF RESPONDENTS' CAUSATION OF EXCLUSION OF PETITIONER FROM COMPETITION.

The Trial Court stated that there was no *direct evidence* of communications by the respondents to the distributors (R. 4284, Liggett Brief p. 15).

The Court of Appeals held (R. 4293; 197 F. 2d, p. 631) that *direct evidence* was essential to a "showing of causal connection between the collusion and the jobbers' refusal to handle plaintiff's product". It then concluded that petitioner was forced to rely on the Lexington Judgment to show the "essential element" of "some connection between Monticello's failure and defendants' proven conspiracy"—

> "for none of the jobbers who testified *admitted* to pressure by defendants" (Petitioner's emphasis).

Obviously, both lower courts predicated dismissal of the complaint on the lack of *direct evidence,* such as *admissions of pressure* by the respondents from the mouths of the distributors, or proof of *communications* by the respondents to the distributors directing them not to handle petitioner's product.

The lower courts ignored the *circumstantial evidence* or *collocation of circumstances** presented by petitioner *de novo,* and *independent of any facts by estoppel from the Lexington Judgment,* but invaded the province of the jury to *conclude on the facts* that petitioner failed to secure distribution because of its own inadequacy, rather than the concerted acts of exclusion by respondents and the controlled distributors.

Such invasion was prohibited by this Court's decision in the *Eastman Kodak Co.* case (273 U. S. 359, 375):

> "* * * 'Clearly', as was said by the Court of Appeals, *'it could not be held as a matter of law that the defendant was actuated by innocent motives rather than by an intention and desire to perpetuate a monopoly.'* This question was submitted under proper instructions. *And the weight of the evidence being in such case exclusively a question for the jury,* its determination is conclusive upon this question of fact * * *". (Petitioner's emphasis)

In that case, there was no *direct evidence* of the defendants' refusal to sell to the plaintiff in pursuance of a purpose to monopolize. Here, absent *direct evidence* of the motives of the distributors in refusing to handle petitioner's product,

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*In *United States* v. *Manton,* (Cir. 2) 107 F. 2d 834, the court below held that the common plan of conspirators may be revealed by a "collocation of circumstances".

it was for the jury to determine whether they were innocent or actuated by respondents' control of them.

II.

RESPONDENTS' BRIEFS CONFIRM THE AVERMENTS OF THE PETITION TO THE EFFECT THAT PETITIONER'S EVIDENCE *DE NOVO*, COUPLED WITH ADMISSION OF THE LEXINGTON JUDGMENT FOR LIMITED EFFECT, PRESENTED TO THE JURY REASONABLE ALTERNATIVE INFERENCES, WHICH WERE REMOVED FROM ITS DETERMINATION BY DISMISSAL OF THE COMPLAINT.

To meet petitioner's demonstration that there was adequate circumstantial evidence to go to the jury on the issue of its exclusion by respondents, they stress certain circumstances as having conclusive factual effect. *They fail completely, however, to show that any of these circumstances were known to the distributors or influenced them.* In effect, they ask this Court to refuse certiorari by finding the facts adversely to petitioner, whereas *petitioner has submitted its summary of evidence* (Petition, pp. 19-40) *only to present the question of law of the sufficiency of the evidence for the jury.*

In their approach to a conclusive factual result in their favor, respondents tend to distort the force of the "facts" relied on by them, as several illustrations will manifest:

Hartley's conviction of larceny was fully explained to the jury as having occurred many years before the petitioner's exclusion from competition, and involved his imprudent use of self-help to recover what he deemed to be his property in an automobile previously purchased by him as a gift for his wife, and which had been transferred without

his consent to a male friend of his wife (R. 2684, ff. 7743, 8221, 8269).

If it were to rely on the Lexington Judgment at all, petitioner had to wait until this Court's decision made it final. It was certainly for the jury to decide whether petitioner's suit was in good faith or to secure a "financial windfall" from respondents' conviction to cover its "failure", as charged by respondent American (p. 15, American Brief).

As to respondents' reliance on Hollingsworth's testimony to show *conclusively* the inadequacy of petitioner's management, it fails to serve that purpose. Hollingsworth found petitioner's promotion procedures sound (Petition, pp. 29-30). *He testified that the "conventional" way to secure distribution was through the jobbers.* He also said that retailers could be sold direct, but did not suggest that, other than to attempt initial distribution this way, it could be *practicably* done indefinitely (R. 3636-37, ff. 10907-908, 10910-911). *Even respondent Riggio conceded that both large and small manufacturers had to have the jobbers to distribute their cigarettes* (Petition, p. 24; Record, 315, f. 944; 338-342). Petitioner *did* sell direct to retailers, but, like its competitors, needed the direct list jobbers for distribution on an effective level (PX 132, Record 2176; PX 152-155, Record 2688-90).

Assuming arguendo that every jobber would testify that refusal to handle the Monticello cigarettes was because of belief that money could not be made on them, it would still be for the jury under the rule of the *Eastman Kodak Co.* case to decide whether refusal was innocently motivated.

The inference of exclusion of petitioner was categorically before the jury in the following manner (putting aside the other circumstances warranting such inference):

Metropolitan Tobacco Company, the largest New York distributor, servicing 30,000 retail outlets and handling the respondents' burley cigarettes for many years, refused distribution to petitioner's salable, good quality, unadulterated, non-burley Monticello cigarettes, *at the very time it gave distribution* to the newly launched Regents cigarettes of Frank Riggio, son of convicted respondent, Vincent Riggio, and as of 1939 very recent former director of sales of respondent, The American Tobacco Company; notwithstanding Monticello cigarettes were ordered by Metropolitan's customers and afforded greater profit (Petition pp. 24, 25, 26, 32-34). Also, there was Crean's experience with Faber, Coe & Gregg, whose head was most intimately connected with respondent, American Tobacco Company, as *director* and business associate of American's officers (Petition, pp. 36-38).

Having before it the facts that the 6,000 distributors servicing the 1,000,000 retail outlets, were the "direct list" customers of respondents and subject to control by them (Petition pp. 20-24), and that respondents had been convicted of unlawful conspiracy in restraint of trade, monopolization, and conspiracy to monopolize (which conspiracies were in operation when petitioner commenced business), **the jury should have been permitted to weigh whether, under all the circumstances, petitioner solicited sufficient distributors or whether further efforts would have been futile. The present case does not involve "speculation run riot" or speculation doing "duty for probative facts."**

Respondents' arguments that petitioner failed to secure distribution because of its own shortcomings boil down to the contention that it made only a "half-hearted" sales effort to challenge the respondents' control of the distributors. The fact of this control was settled at Lexington (Petition,

pp. 8-9, 18-19) and petitioner offered its evidence *de novo* to establish it again in the present case (Petition, pp. 20-24, 32-39).

Respondents seek to evade the issues of their control of the distribution system and the exclusion of petitioner by asserting that petitioner was not a competitor, because its non-burley cigarette was to be sold at a retail price three cents per pack higher than their "popular brands", and petitioner's stock prospectus stated that it did not intend to compete with the "popular brands". Clearly, petitioner did not seek a market for its cigarette at a price as low as respondents' brands; but respondents simply ignore the fact that petitioner *was* their competitor for public taste with its unadulterated, non-burley cigarette at a *higher* price (Petition, pp. 24-25; R. 2880, 8638-39).

Contrary to the contention of respondents, the trial court clearly expressed the view that there was no basis for the inference that petitioner was excluded by them, because the evidence at Lexington did not show that respondents ever directed distributors to stop distributing a brand on penalty of being removed from the profitable "direct list", the court saying, "they never did that" (Record, 155; 159, f. 477). For the trial court's further views in this regard, attention is called to page 41 of the Petition, pointing to the record where the colloquy clearly shows the mind of the court.

Petitioner submits that the Petition amply demonstrates that there were substantial fact issues, which were taken from the jury by the courts below contrary to the rule of the *Story Parchment Co.* case (Brief in Support of Petition, pp. 59-60).

III.

THE TRIAL COURT DENIED PETITIONER THE ULTIMATE FACTS ESTABLISHED BY THE LEXINGTON JUDGMENT, WHICH WERE *PRIMA FACIE* EVIDENCE OF RESPONDENTS' CONTROL OF DISTRIBUTORS.

Bearing in mind that petitioner entered business *during* the course of respondents' monopolization and conspiracy to monopolize, petitioner contends that it is no answer for the respondents to argue that the Lexington Judgment proved only a conspiracy to exclude by price-fixing. Even if that were so, the power to control distributors for such purpose, would afford the jury a reasonable basis to infer the power and intent to exclude other brands, such as petitioner's. According to the argument of respondents, their inability to determine which means the Lexington jury found were used to effectuate the conspiracy, entails equal inability to determine the ultimate facts found, which this court had no difficulty in observing (Petition, pp. 18-19).

There is, therefore, no force to the contention that the Lexington Judgment is entirely inadequate to furnish petitioner *any* facts by estoppel showing control of distributors by respondents, in aid of its *prima facie* case.

IV.

RESPONDENTS' FACTUAL APPROACH LEAVES NO DOUBT THAT IN ADDITION TO THE OTHER GENERAL QUESTIONS OF LAW PRESENTED, THERE IS THE IMPORTANT QUESTION OF DISMISSAL OF THE COMPLAINT AS A RESULT OF ERRONEOUS INVASION OF THE JURY'S PROVINCE.

CONCLUSION

The Petition presents most meritorious grounds for issuance of the writ, which petitioner earnestly prays be granted.

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